CRIME AND PUNISHMENT
IN
ANCIENT INDIA.

BOOKS I & II

BY

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TO

The Memory

OF

MY MOTHER.

PREFACE

WITH great diffidence I come out before the public with this—my first humble venture. I am fully aware of the many imperfections in this little book and the errors that have crept into it, inspite of my best endeavours. But I had to work under great difficulties, mainly for want of books of reference. I could have improved it to a great extent if I could have all the books I wanted to consult. Moreover, as I could not personally supervise the printing many mistakes have occurred in it.

The importance of the subject can not be gainsaid—in as much as the penal law of a country is the true index of its civilisation. I have tried to present in these few pages, in a systematised and scientific form, the salient features of the Hindu criminal law, and a comparative study of its excellences and imperfections in a non-partisan and historical spirit—with what success I leave it to my indulgent readers to judge. I wish it were taken up by abler hands who have greater facilities to do full justice to the vast subject. I should mention here that I have made numerous quotations from standard and authoritative works, which it has not been possible for me to acknowledge in every instance. I have made a reference to them in the Bibliography.

This work was first taken up by me five years ago, and I would be failing in my duty if I do not express my gratitude to Dr. Watt, the then Principal of the Scottish Churches College, whose solicitude and encouragement induced me to undertake the work. I am also indebted to Mr. Ajit Kumar Sen M.A. of the Dacca University and

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Mr. K. K. Sen, Retired District Judge, Bengal, has been kind enough to go through the manuscript of the greater portion of this book and give me valuable suggestions. Lastly, I must convey my thanks to Mr. Jitendra Kumar Das for kindly looking over the proofs and Mr. Phanindra Nath Bhowmick for taking a personal interest in expediting the publication.

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Book I.

EXPLANATORY NOTES.

PANA— 1 Karsha of Copper is a Karshapana or a Pana—1 Karsha = 16 Mashas = 80 Krishnalas.
1 Krishnala = 1·875 Grains.

SUVARNA (Gold)— 5 Krishnalas = 1 Masha ; 16 Mashas = 1 Suvarna.

SATAMANA—2 Krishnalas of Silver = 1 Mashaka of Silver ; 16 Maskakas = 1 Silver dharana ; 10 Dharanas of Silver = 1 Satamana.

NISHKA— 4 Suvarnas = 1 Nishka.

KAKANI— 1 Kakani = $\frac{1}{4}$ Masha.
For details see Manu VIII, 131—137 ; Vishnu IV, 1—14 ; Yagnavalkya 1, 361—365 ; & Narada (Nepalese Manuscript), 55—60.

INTRODUCTION.

Development of the Hindu Criminal Law.

The study of the Hindu Criminal Law has mainly an academic interest. To the practising lawyer it is of little use, for it is no longer in force in any part of India, nor does it serve as a basis for the Indian Penal Code. So, naturally, while the civil law of the Hindus has received a careful attention from a host of jurists and lawyers, the criminal law has been systematically ignored. Yet the study of the Hindu criminal law is no less important to the student of ancient Indian civilisation. It gives him an insight into the political, social, economic and religious conditions of the country in early times.

The Hindu criminal law has an evolutionary character. From the humblest beginnings it developed into a fairly advanced system of law, inspite of its many defects. It is difficult to ascertain, with any degree of precision, the approximate dates of the various law books; still it is possible to settle their chronology with some amount of certainty from internal evidence—i.e. from a study of the laws. They represent various stages of development of civilisation. There can be little doubt that the criminal laws laid down by Gautama, Vasistha, Apastamba and Baudhayana represent an earlier stage than those of Manu In them we find the germ of a criminal law which is as yet rudimentary. Sometimes it is difficult to distinguish between laws proper and rules of penance. But when we come to Manu, the criminal law has already reached a high stage of development. A clear distinction has been drawn between criminal law, or rather laws, and

rules of penance. The number of offences dealt with is quite numerous and indicates a complex and advanced stage of society. The punishments, though often brutal, are nevertheless reasonable and effective, and show a great anxiety to suppress crimes by an attempt to make them correspond to the gravity of offences. An attempt has been made to classify the subject matters of law suits (including crimes) and to define some grave and common offences. The object of punishment has been clearly grasped. Extenuating circumstances or other considerations have been carefully laid down. Modes of punishments have also been enumerated. The duty of the state to suppress crimes has been sufficiently emphasized and arrangements have been made for their suppression, and apprehension of criminals.

The laws of Vishnu are less systematic and much more inadequate than those of Manu. Though this would lead one to presume that they were earlier, yet in reality they represent a later stage of development. In many cases he quotes the very recommendations of Manu, while in many other instances his recommendations are similar to those of the latter. But in others, they breathe a more modern spirit. An attempt has been made to humanize punishments. In many offences of comparatively light nature, capital punishment has been superseded by mutilation or fine. The number of capital offences has thus been considerably reduced. The influence of Buddhism, with its regard for the sanctity of animal life, is quite evident. Punishment has been laid down even for unnecessary killing of a worm. In many respects they foreshadow the liberal and humane law of Yagnavalkya and Kautilya, who undoubtedly represent a much later and advanced stage of society than Manu. So we may take it, that Vishnu is the first law-giver to revolt against the brutal severity of Manu's laws and to make the bold attempt of humanizing them, though in many cases he thinks it unnecessary to change them and incorporates them in his book. For, after all, he attempts to remove the defects of Manu's laws and bring them in harmony

with the moral idea of his time, rather than to frame a new code quite independent of Manu's. The circumstance that he is less advanced than Manu, as regards definition and classification, is no reason for suspecting that he belonged to an earlier period. In fact he stands as the connecting link between Manu and Yagnavalkya.

The next stage of development is reached in the time of Yagnavalkya and Kautilya. In this connection it may not be out of place to state that although the latter is not regarded as an authoritative law-giver by the Hindus, there is still no reason to suspect that he does not give a correct record of laws of punishment of his time. The fact that in essence his recommendations are strikingly similar to those of Yagnavalkya, lends support to this view. It could not be due to chance coincidence or plagiarism; it rather indicates that he gives an accurate account of the laws as were administered in his time. If, as is generally supposed, Kautilya was the Prime Minister of Chandra Gupta Mauryya, it would help us to fix the age of Yagnavalkya, for surely they represent the same stage of social development, and as such were nearly contemporaries. In both Yagnavalkya and Kautilya, the laws have become more comprehensive, more reasonable and much more humane. While Vishnu has followed more or less the recommendations of Manu, in Yagnavalkya and Kautilya the departure is marked and complete. It is not, however, suggested that in all cases their recommendations are dissimilar to Manu, but as a general rule they have struck an independent note of their own. They do not hesitate to give their honest opinions and to provide for the changed conditions of society. As a result of the softening influence of time and civilisation, much of the severity of the criminal law has been done away with, capital punishment has been reduced to the minimum and they recommend, in lighter offences, comparatively mild punishments. Moreover, the procedure has been much developed and a regular grade of courts has been established. Regular rules for properly conducting trial have been

laid down, or we may say, a regular civil and criminal procedure has been formulated. The society and state depicted by Kautilya are highly developed and organised. He provides rules for an all round guidance of man. The municipal laws formulated by him are excellent, and breathe a modern spirit. The laws relating to state policy are no less interesting. Public health and sanitation have received anxious care from him. Laws relating to public justice display a high ideal of justice and morality. In short, no department of life has escaped the careful attention of the astute statesman. It is apparent, even to a casual reader, that the distance between Manu and Kautilya (and consequently Yagnavalkya) is very great. It is quite possible that even when Yagnavalkya's code was drawn up, Manu's law might have been in force in some parts of India, but as they were unsuited to the growing demands of the state in greater parts of the country, Yajnavalkya's code must have replaced the antiquated laws of Manu.

We are now confronted with a difficulty, which at the first sight seems insurmountable—what stage of social development do Narada, Brihaspati and Katyayana, who doubtless belong almost to the same stage, represent? One is at once tempted to think that they were very close to Bhrigu who describes Manu's laws. For, not only are many of their recommendations similar, but often they quote Manu *verbatim*—nay more, Narada also professes to relate Manu's laws, and according to Skanda Purana that is the case with Brihaspati also. But on closer consideration the divergence between Bhrigu, and Narada and Brihaspati, will be evident. The method of treatment in their case is far advanced. The arrangement is much more scientific and original. The classification and definitions are more accurate and methodical. The subjectmatter is dealt with much more exhaustively. Above all, while in the case of Manu the procedure is still undeveloped, in Narada and Brihaspati a highly developed and scientific procedure has grown up. In these respects they show a

a great advance on Yajnavalkya and Kautilya also. Moreover, though they have retained many of the recommendations of Manu, they have added a great many new suggestions and improvements. And lastly Narada is essentially a lawgiver while the others are not, for they have dealt with laws incidentally in their books.

Now how can we explain this difficulty? If they are posterior to Yajnavalkya (and Kautilya) why do they follow Manu instead of the former? Yet there can be little doubt that they are much later lawgivers than Yajnavalkya. There are two possible explanations. It has been already observed that perhaps Yajnavalkya was not able to replace Manu in some parts of the country where the latter's recommendations, with necessary changes, were followed. At a later period, Narada, Brihaspati and others revised Manu's code and brought it up-to-date. Thus we find that though Narada professes to recount Manu's laws he has not hesitated to change many of them. In fact he has improved upon them considerably. Another possible explanation is that as Yajnavalkya's recommendations are comparatively very lenient, probably under the influence of Buddhism, in later times when Hinduism was again triumphant, he was regarded with disfavour and there was a return to Manu (and his severity) who was believed to be the most orthodox lawgiver. But the new admirers of Manu could not wholly set back the hands of the clock. Thus we find that though they have taken Manu as their ideal, they have had to make much alterations and additions.

Narada, Brihaspati and Katyayana doubtless represent the last stage of legal development. They are the last of the original lawgivers of ancient India. Of course, some of the Puranas have also dealt with law. But it is not their main concern. From a study of their laws it would appear that they also belong to this last stage, at least as far as the criminal law is concerned. Naturally, some of the recommendations of Agni Purana and Matsya

Purana are similar to those of Manu, while others are of an advanced stage. It may be mentioned here that it is the considered opinion of many scholars that though many of the Puranas were of very ancient origin, their present form must date from a considerably recent period. So it will not be incorrect if we place them after the Narada-Brihaspati-Katyayana group.

Lastly as regards the commentaries, they merely, seek to explain the recommendations of the lawgivers and to reconcile the divergence of opinions of different authorities by interpretation. By this time a belief in the infallibility of the Smritis has grown up. So, whenever they come across any difference of opinion in two Smritis, they have not the courage to say that it is due to the fact that the later law repeals the older one, or as Yajnavalkya says, when there is a conflict between two Smritis that which is consonant with reason should be accepted (Smrityo-yorbirodhe nyayastoo balaban Vyabaharath). (1) Instead of doing so, they try to justify both by sophistical interpretations, and thus consciously or unconsciously, they really change the law. But they do not pretend to be original lawgivers. Thus with their advent, the formative period of the Hindu criminal law comes to an end. That is also the case with the Digests such as, Vivada Chintamoni and others.

Finally, as regards the question whether the Hindu criminal law was ever applied in practice, there seems to be hardly any reason to suspect that it was not. In this connection it may be mentioned that Dr. Naresh Chandra Sen Gupta in his "Sources of Law and Society in Ancient India" is of the same opinion. In this treatise he has given a crushing reply to Nelson's bold and unwarranted assertion, that the Hindus had no courts and no laws for their guidance. Dr. Sen Gupta very aptly remarks, "..... Smriti law

(1) Y. II, 21.

was the practical law administered at some time in ancient India—no matter when ; and the authors of commentaries and digests were not dilettantes engaged in building up elaborate aerial castles. The evidence of epigraphic records, such as they are, also furnishes some independent corroboration of the theory that Smriti law was honoured by Hindu Kings. In literature too, the trial scenes in Mricchakatika and Dhurta-Sangam show that in the main Smriti law was sought to be followed by kings in the times of their authors." (2)

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(2) Dr Nares Sen Gupta's 'Sources of Law and Society in Ancient India'—Introduction—Pp. 5 & 6.

CHAPTER I

LAW OF CRIMES NOT LAW OF TORTS.

In this chapter we propose to deal with the question whether the Hindu law relating to offences was a law of crimes or a law of torts. This question has been admirably discussed by Dr. Priya Nath Sen in his Hindu Jurisprudence. (1) He has shown the inapplicability of Maines' *obiter dictum* in respect of the Hindu law, "The penal law of ancient communities is not the law of crimes; it is the law of wrongs, or, to use the English technical word, of torts. The person injured proceeds against the wrong doer by an ordinary civil action, and recovers compensation in the shape of money damages if he succeeds." (2) Of course, the Hindu law relating to offences may not exactly be criminal law in the modern sense of the term, but there can be no doubt that it is not law of torts. For even according to Maine, in the law of of torts "the person injured proceeds against the wrong doer by an ordinary civil action, and recovers compensation in the shape of money damages." So the main object of the law of torts is to give compensation to the injured. The state does not derive any profit nor has it an immediate interest in the matter. Now, if we carefully go through the Hindu law regarding offences, we would find that in many cases the penalty imposed on the offender is not pecuniary at all (e.g. death, mutilation, imprisonment, banishment, etc.), while in those where a money penalty is inflicted, it is in the nature of a fine and not of compensation—for it goes to the royal treasury and not to the pocket of the complainant or the injured. Even when in some cases of hurt some compensation is allowed to the aggrieved, it is to defray the expenses of medical treatment, and in addition to the fine payable

(1) Hindu Jurisprudence—Lect XII—PP. 335ff

(2) Maines' Ancient Law—ch—X—The Early History of Delict and crime, P 307.

to the state. (3) So that by no stretch of imagination could the penal laws of the ancient Hindus be called law of torts.

But the question is whether we can call them criminal laws. The answer should be in the affirmative. The object of these laws is primarily the punishment of offenders and the suppression of crimes. So their nature is essentially criminal. Then, as to the point whether the state considered itself injured by individual acts of crimes, we find that in all criminal cases the injured party would sue the wrong doer. So, strictly speaking, the state was not a party to the cause. But the state would do its best to apprehend the criminal and bring him to justice whenever any information was given to it. And it appears that even if no complaint was lodged, the state would, of its own initiative, act to detect the offender and punish him in some grave cases, e.g., when the dead body of an unknown person was discovered the state would try to ascertain the cause of death, and if it seemed to be a case of murder, it would spare no pains to detect the murderer and bring him to trial.(4) Besides, as Dr. Sen observes on the authority of Pitamaha (P. 336), "whereas it was generally directed that neither a king nor his officers should create or foster litigation of their own accord but should ordinarily refuse to take cognisance of a cause of action without a complaint from the person aggrieved, yet cases of frauds and the various other forms of crimes furnished exceptions to the general rule, for there it was directed that the king should take cognisance of them even without a complaint." It may be further noticed that in cases of murder, it was not only the right of the relatives of the murdered to prosecute the murderer, but any member

(3) M viii, 287; vi, v, 75; Kau iii Ch xix—195; Y. ii, 222; Br. xxi, 10

(4) See Chapter VII *post*.

of the public had the right to prefer a complaint and demand justice In Mrichchakatika (5) we find Sansthanaka, the brother-in-law of the king, accusing Charudatta, a respectable merchant, of the murder of Vasantasena, a woman of the town, who was Charudatta's mistress. There was no tie of relationship between Sansthanaka and Vasantasena, whose mother was still alive and present in the town. Obviously Sansthanaka demanded justice against Charudatta because *as a member of the state he considered himself injured* by the heinous crime. Or it may be said that the state considered itself aggrieved and was *represented* by one of its citizens. Further, it is interesting to note that in such cases, individual interest was merged in the greater interest of the state. The state would not let go the offender even if the relatives of the victim were willing to forgive the offender and to stay the course of justice. The mother of Vasantasena, who had been in the meantime brought to the court to facilitate the conduct of the case, took pity on Charudatta and wanted to withdraw the case. She implored, "Be merciful, good gentleman, be merciful! If my daughter is killed, she is killed. Let him live for me—bless him! And besides, a lawsuit is a matter between plaintiff and defendant. I am the real plaintiff. So let him go free!" (6) But Sansthanaka insisted on the trial and the judge also ignored the prayer of the mother and went on with the case. Evidently, the interest of the state prevailed.

Not only in murder, but in many other crimes also, it was the duty of the state to detect and punish offenders.(7) It is clear that the state considered itself injured by the acts of aggression on the part of the criminals, otherwise it would not make elaborate arrangements to prevent crimes and to bring the criminals to justice. So, although

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(5) Mricchakatika—Act 9—The Trial—Pp. 133 ff.

(6) Mr.—Act 9—P 151.

(7) See Ch VII. *post*.

in criminal cases the state was not generally a party, it was sufficiently interested. It did not matter who prosecuted the criminal, whether the injured party or the state on its complaint. As it was almost certain that the injured party would try its best to bring the culprit to justice, the state could very well leave the matter to its hand. It might be argued that the aggrieved party might come to some arrangement with the offender and drop the prosecution without bringing it to the notice of state officers, and in such cases the state would not be able to punish the wrongdoer for the breach of its peace. It should, however, be remembered that even if the state took the formal prosecution in its own hand it would have to depend largely on the injured party for the successful conduct of the case. If, in such a case, there is a collusion between the offender and the injured, the state is generally helpless and there is every possibility that the former wonld evade punishment. Moreover, almost in every case the state gets the first information of a crime from the injured party. If the injured party wishes to suppress it, it will not generally come to light. It may be argued if the injured party did not prefer a complaint anyone of the public has the right and duty of informing the matter to the police, and consequently, the offender was sure to be punished even if the sufferer did not come forward to help the state. It appears from Mrichchakatika that the same right belonged to the public in ancient India—at least in grave crimes. In this connection it should be further mentioned that the law did not permit anyone to come to a private arrangement with the offender so as to condone the wrong for some consideration. We find in Yajnavalkya that if a person called the paramour of his female relative a thief so as to hide his shame, he should be punished with a fine of 50 panas, and if he did not arrest the person and bring him to justice on receiving some gratification, he should be punished with a fine of eight times the hushmoney.(8)

(8) Y II, 301.

That serious offences were regarded as belonging to a different category from private wrongs and demanded special treatment is apparent from the following facts. While Manu and other lawgivers declare some people as incompetent witness in ordinary cases, they distinctly lay down that in all kinds of violence (Sahasa), theft, adultery, assault and abuses, the competence of the witnesses need not be examined (9). Again, Manu draws the special attention of the king to these offences :—"That king in whose town lives no thief, no adulterer, no defamer, no man guilty of violence and committer of assaults, attains the world of Sakra (Indra). The suppression of those five in his dominions secures to a king paramount sovereignty among his peers and fame in the world." (10). Vishnu also holds the same opinion (11). The reason why greater prominence was given to these offences must be sought in the fact that they were detrimental to the peace, order and good government of the country, and as such the state was greatly interested in the suppression of these crimes.

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(9) M. VIII, 72; N. Intro , 189.

(10) M. VIII, 386 & 387.

(11) Vi V, 196.

CHAPTER II

END OF PUNISHMENT.

The Hindu theory of punishment is mainly deterrent. The lawbooks make it abundantly clear that the main end of punishment is the maintenance of society and protection of all creatures by deterring evil-minded people from the commission of crime and deviation from the path of duty. In order to protect all creatures, Brahma has created 'out of his own essence' the rod of punishment (1) "It alone governs all creatures and protects them; for when people are asleep it watches them" (2).

So, the Hindu idea is that in order to protect the people from the transgressions of the wicked and evil-minded, it is necessary that the king must always punish with a strong hand those who have committed crimes. By punishing the guilty the king effectively deters all such people who would otherwise commit crimes. The fundamental idea is to strike terror into the heart of all potential criminals by the example of sure and swift punishment. In this connection it may be noticed that the Hindu lawgivers make a very low estimate of human nature. They assume that men are by nature evil, and do not fly at each other's neck only because there is the king to punish them. According to Manu if the king failed to punish the offenders unremittingly, the powerful 'would roast the weak like fishes on a pit.' (3). So also in Matsya Purana, we find that if the king did not inflict punishment the strong would oppress the weak, just as big

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(1) M VII, 14 (2) M. VII, 18.

(3) M VII 22.

fish swallow the smaller ones. (4). Again, Manu says that if there had been no terror of punishment, no one would enjoy the right of ownership in anything. It is punishment which keeps the whole world in order, since we seldom find a guiltless person. (5).

This idea has been emphasized in Mahavarata also. Arjuna says, "Your Majesty, it is the rod of punishment which governs and protects the people, and it is awake even when they are asleep ; so the wise call it 'dharma'. Punishment alone protects religion (dharma), wealth (artha) and the enjoyment of sex (kama); hence it is called 'trivarga' or threefold. What more ! even the riches and corn of the people are protected by punishment * * * Well, in this world some viciously inclined people abstain from vice only in fear of punishment of the king, some in fear of punishment in after life, some in fear of retaliation from others. These people are engaged in their lawful duties from fear of punishment only * * * There are many people who do not devour each other only from fear of punishment. What more ! If the rod of punishment did not protect the people, they would fall in the hell of darkness * * * Laws of punishment have been established for the preservation of the wealth and security of the people. In the state where the king deals even-handed justice, and where the blue-coloured and red-eyed punishment is present the subjects are never sinful. All the Asramas, Brahmacharyya, Garhastya, Banaprastha and Yati, are maintained in proper order through fear of punishment only." (6). So also Bhisma says, "If there had been no punishment in this world men would oppress each other. Well, Judhisthira, it is from fear of punishment that men do not strike each other. " (7)

According to Kautilya, "Punishment, when awarded with due consideration, makes the people devoted to righteousness

(4) M. P., Ch. CCXXVII, 9. (5) M. VII, 21 & 22.
(6) Santi Parva, Ch. XV (7) Santi Parva, Ch 121.

and to works productive of wealth and enjoyment ... But when the law of punishment is kept in abeyance, it gives rise to such disorder as is implied in the proverb of fishes ; for in the absence of the magistrate the strong will swallow the weak, but under his protection the weak resist the strong." (8). Sukra also lays emphasis upon the deterrent object of punishment. "Through fear of punishment the subjects become virtuous, do not commit aggressions and do not speak the untruth." (9)

That the main object of punishment was to deter wicked people from the commission of crimes by the example of the sufferings of the offenders is quite evident from the following recommendation of Manu :—"Let him (the king) place all prisons near a highroad, where the suffering and disfigured offenders can be seen." (10) Here it is implied that the passers by would be deterred from the commission of crime by the sight of the miserable plight and sufferings of the prisoners. In another place Manu says, "Then having caused the crimes, which they (thieves) have committed by their several actions, to be proclaimed in accordance with the facts, the king shall duly punish them according to their strength and their crimes." (11) The object of proclamation before inflicting punishment is evidently to deter people by the example of the fate of these offenders.

Though the primary object of punishment, according to the Hindus, is deterrent, there are other secondary considerations as well. To some extent it is also preventive. When an offender is punished with death, or banishment, or imprisonment, or mutilation, one other motive of of so punishing him is to prevent him from repeating such offences. Thus Manu urges a king to repress miscreants (thieves according to Medhatithi & Kulluka) by the three lawful punishments of imprisonment, enchainment and

(8) Kau. I. Ch. IV, 9. (9) Sukra Ch. IV-Sec 1, 92,93.
(10) M. IV, 288. (11) M. IX, 262.

various forms of corporal punishments. (12) Here evidently these punishments are recommended not only to deter others, but also to prevent the offenders from repeating these crimes. So also in another place he advises the king to cut off the offending limb of a thief to prevent him from stealing again. (13) That is also the opinion of Brihaspati who lays down, "In the case of taking by force women, men, gold, gems, the property of a diety or Brahmana, silk and (other) precious things, the fine shall be equal to the value (of the article stolen), or double the amount shall be inflicted by the king as a fine ; or the thief shall be executed, to prevent a repetition (of the crime)." (14) Sukra is definite on this point when he says, " The punishment of the wicked means prevention of wicked action by them." (15).

Another idea involved in punishment is that it should be corrective also. An offender is to be punished in order to reform his character, ways and manners. This aspect of punishment has often been emphasized by the Hindu lawgivers. According to Yagnavalkya, the king should punish with proper consideration of offence, the families, castes, guilds, and the people of the town and the country who have deviated from their own duties (*Swadharmkkalitan*), and place them in their proper path (*Sthapayet pathi*). (16) Obviously, the aim of the lawgiver is to reform the character of offenders. In the Mahavarata also the same sentiment has been expressed when it has been recommended that the king should reform or correct miscreants by punishment. (17) So also Sukra advocates the reformative theory of punishment when he says, " The king should punish such bad men and also those who have been vitiated by bad company and teach them good ways of life."(18)

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(12) M. VIII. 310. (13) M. VIII. 334.
(14) Brih XXII, 27 & 28. (15) Sukra—Ch IV—Sec. U, 6.
(16) Y. I. 361 (17) Santi Parva—, Ch 121.
(18) Sukra—Ch iv—Sec. I, 219 & 220.

Lastly, punishment is regarded by the Hindu lawgivers as a means of purification. Whenever a man commits a crime, he commits a sin. But if the offender is punished by the king he is cleared of his moral guilt or sin. The Hindu lawgivers have laid great stress on this theory. So, according to them, if a thief (who has stolen gold) is killed by the king, he is purified of the guilt. If he is forgiven the guilt falls on the king.(19) Manu makes the point quite clear when he says. "But men who have committed crimes and have been punished by the king, go to heaven, being pure like those who performed meritorious deeds."(20) The same idea is conveyed when in Mahavarata King Sudumna tells the great sage Likhita, "If you think that punished by the king an offender is exonerated of his sin, in that case he becomes equally sinless if he be pardoned by the king."(21)

Thus in the Hindu theory of punishment, four ideas are involved, viz., (i) deterrent, (ii) preventive, (iii) corrective, and (iv) purificatory.Of these the first is most prominent

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(19) G. XII, 43—45, Ap. I, 25, 4-5; Vas. XX, 41 ; Bau II 1, 16-17 ; M VIII, 316 ; VI, LII, 1-2 ; & Y. III, 257

(20) M. VIII, 318 ; Nar. N. M. 48. (21) Santi Parva Ch. xxiii.

CHAPTER III

CRIMINAL LIABILITY.

(I) 'MENS REA'

Salmond says, "The general conditions of penal liability are indicated with sufficient accuracy in the legal maxim, 'Actus non facit reum, nisi mens sit rea'—The act alone does not amount to guilt; it must be accompanied by guilty mind. * * * The 'mens rea' or guilty mind includes two and only two distinct mental attitudes of the of the doer towards the deed. These are intention and negligence. Generally speaking a man is penally responsible only for those wrongful acts which he does either wilfully or negligently. * * * Inevitable accident or mistake—the absence of both of wrongful intention and of culpable negligence—is in general a sufficient ground of exemption from penal responsibility." (1)

So, according to modern jurists a man is liable to be punished only when he commits an offence intentionally, or out of criminal negligence. When both these factors are absent he is immune from punishment. It appears that similar views were entertained by the Hindu lawgivers as well. As a rule they do not prescribe any punishment for an act which has been done unintentionally and not through criminal negligence. Even in the latter case the punishment is more lenient.

Gautama lays down that a Sudra ***intentionally*** abusing or assaulting a twice-born shall be deprived of his offending limb. So also a king should pour molten tin or

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(1) Salmond's Jurisprudence—ch. XVI—Sec. 12—P. 378.

lac in the ear of a Sudra *intentionally* listening to the recitation of the Vedas. (2) Obviously the lawgiver makes it clear that the Sudra is to be punished only when he has a guilty intention, else he is not to be punished. The guilty intention is apparently the essence of crime.

With Manu, however, there is some uncertainty on this point. In one place he even holds men unintentionally committing some heinous crimes (*Mahapataka*) liable to punishment, though the nature of punishment is more lenient. Thus a Brahman unintentionally committing any of the great crimes has to pay a fine of madhyama Sahasa class; but the king shall banish him from the state with all his belongings if he intentionally commits any of them. Others unwillingly committing any of these crimes shall be deprived of all their property, but if wilfully guilty they shall be banished from the country. (3) Here, Manu lays down punishment for unintentional commission of great crimes though it is less severe than in wilful cases. Does he mean that punishment is to be inflicted in cases of criminal negligence? This appears to be most probable. For it is clear from other recommendations that he does not hold anyone liable to punishment for offences unintentionally committed and without criminal negligence. And when the act is unintentional but due to criminal negligence there must be some punishment, though it is less severe. "They declare with respect to a carriage, its driver and its owner, (that there are) ten cases in which no punishment (for damage) done can be inflicted: in other cases a fine is prescribed. When the nosestring is snapped, when the yoke is broken, when the carriage turns sideways or back, when the axle or wheel is broken, when the leather thongs, the rope around the neck or the bridle is broken, and when (the driver) has loudly called out, 'Make way', Manu has declared (that in all these cases) no punishment shall be inflicted." (4) Evidently no punish-

(2) G. XII, 1 & 4. (3) M. IX, 242.

(4) M. VIII, 290—292.

ment is prescribed as the acts are unintentional, and not due to negligence : these are accidents over which one has no control. But the offender is liable to punishment even if the offence is unintentional, in the event of criminal negligence. Thus Manu holds, "But if the cart turns off (the road) through the driver's want of skill, the owner shall be fined, if damage (is done), two hundred (panas). If the driver is skilful (but negligent), he alone shall be fined; if the driver is unskilful,the occupants of the carriage (also) shall be each fined hundred (panas). But if he is stopped on his way by cattle or by another carriage, and he causes the death of any living being, a fine shall without doubt be imposed. If a man is killed, his guilt will be at once the same as (that of) a thief (i.e. he must pay the highest amercement.)" (*manushya marane kshiptam kaurabat kilvisham.*) (5) Here punishment has been prescribed because the offence, though unintentional, is due to extreme carelessness or negligence of the charioteer or of his master (when the driver is inefficient) and as such both of them can not escape scotfree. But as it is not intentional the punishment must not be same as that for murder but much more lenient.

That intention constitutes the essence of crime is also clear from Vishnu, who recommends capital punishment for an untouchable *wilfully* touching any of the three higher castes.(6) Evidently there should be no punishment—at least no capital punishment—when the act is unintentional.

Kautilya is of the same opinion. According to him, "(The charioteer) who cries out to a passerby 'get out' shall not be punished for collision."(7) This immunity is obviously because the collision is not only unintentional, but

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(5) M. VIII, 293—296.

(6) VI V, 104.

(7) Kau,IV—Ch. X III, 232.

not due to culpable negligence either, since there was previous warning. So also "when an animal which has its nose string cut off, or which is not well-tamed to yoke, causes hurt; or when an animal either coming furiously against a man or receding backwards with the cart to which it is tied, causes hurt, or when an animal causes hurt in confusion brought about by the thronging of people and other animals, the owner of the animal shall not be punished; but for hurt caused to men under circumstances other than the above, fines shall be imposed as laid down before, while the loss of any animal life due to such causes shall be made good."(8)

The same opinion is expressed by Yagnavalkya. He also holds that when the nose string of a bullock is snapped, or the yoke is broken, or the cart is moving backward and forward, the owner of the cart is not liable for any injury done.(9) Again, the owner is not responsible for the injury committed by a quadruped if he has warned the passersby by shouting (prajalpatah); so also a man is not responsible for the harm resulting from (the throwing of) a piece of wood, brick, arrow, stone, arms, or caused by a pair of horses (tied to a carriage) when he has given due warning before hand.(10) The importance of intention is prominently brought out when the lawgiver lays down, that the herdsman or the keeper of the cattle is not liable to punishment when the cattle grazes on the field near the high way, or the village or the pasture ground, if it has not been *intentionally* allowed to do so (akamatat); but if he intentionally allows his cattle to graze, he should be punished with the penalty of theft.(11)

Brihaspati also lays emphasis on intention. He lays down, "A passage by which men and animals go to and fro unprevented is called *samsarana*, and must not be

(8) Kau. IV—Ch. xiii, §233.

(9) Y. II, 299. (10) Y. II, 298. (11) Y. II, 162.

obstructed by any one. He who ***purposely*** crowds such a place (by carts and the like), or makes a pit, or plants trees, or voids excrements, shall pay a masha as a fine."(12)

It is thus clear that according to Hindu law, a person is liable to punishment only for offences committed intentionally or out of gross negligence.

(II) IGNORANCE.

According to modern jurisprudence ignorance of law is no defence. But in criminal cases ignorance of fact is generally a good defence.(13) It is not clear whether ignorance of law was a good excuse in ancient India, though according to Manu the King should justly punish the wrongdoer after having taken into consideration the time and place of the offence, and the strength and ***knowledge*** (Vidyam) of the offender. (14) Most probably he means that the punishment should be light or heavy according as the offender is ignorant or well-read in the Sastras. Certainly ignorance does not wholly exonerate him. That this is what he means will be evident from another recommendation of his :—"In (a case of) theft the guilt of a Sudra shall be eightfold, that of a Vaisya sixteenfold, that of a Kshatriya two-and-thirtyfold, that of a Brahmana sixtyfourfold, or quite a hundredfold, or (even) twice four-and-sixtyfold, (each of them) knowing the nature of the offence."(15) It should be noticed in this connection that other lawgivers do not mention ignorance or knowledge as an element to be taken into consideration in inflicting punishment.(16) However that may be, ignorance of fact is a good defence in the Hindu criminal law also. Although there are cases where even inspite of ignorance of fact the offender is punished, it is to be noted that in such cases the punishments are less heavy.

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(12) Brih. XIX, 27 & 28.
(13) Salmond—Ch. XIX—147—pp 375 & 376.
(14) M. VII, 16 (15) M. VIII, 337 &338; so also G. XII, 15-17.
(16) G XII, 51; Vas. XIX, 9; VI. III 91; Y. I, 367

According to Manu, Yajnavalkya and Kautilya when a man gives food, shelter &c., to thieves or murderers, *knowing* that they are such, he is liable to punishment as a thief (17) Here the essence of the crime is the knowledge of the fact that the men are thieves or murderers. Of course Manu does not specifically mention knowledge as a condition of punishment but his commentator Kulluka interprets it in that way (cauratvam gnatva). Yagnavalkya and Kautilya are however quite definite on this point. The former prescribes the highest amercement for the person who gives food, shelter &c., to a thief or a murderer, *knowing* him as such (janato dama uttamah). Here there is no room for doubt that the punishment is to be inflicted only when one harbours the offender with knowledge. If he is ignorant of the fact, certainly there should be no punishment. This point has been made quite clear by Kautilya. "When a person supplies murderers or thieves with food, dress, any requisites, fire, information, any plan, or assistance in any way, he shall be punished with the highest amercement. *When he does so under ignorance, he shall be censured.*" (Parivashanamavignane). Here, it is definitely laid down that the fine should be imposed only when the help is given with knowledge of his character, otherwise not. When it is done through ignorance he should only be rebuked for his careleseness.

Other instances may be multiplied. If we examine the laws relating to the receiving of stolen articles (18) it will be evident that there the gist of the offence lies in the *knowledge* of the articles being stolen, or reasonable ground for such a belief. Thus if a person purchases or receives a thing knowing it to be stolen, or secretly, in the interior of a house or outside the village, at night and at a reduced price or from a notoriously dishonest person or from an unauthorised slave, he is guilty of receiving stolen article (if the article is subsequently found to

(17) M. IX, 271 & 278; Y. II, 276; & Kau. IV—Ch. XI—227.

(18) See Book II—Ch. X—Sec. 7.

be stolen). On other hand when the purchase is made without knowing the article to be stolen, or openly, at a reasonable price and in a proper place and at a proper time the purchaser is not guilty. In such a case ignorance of fact is a good defence.

From the above it may well be held that ignorance of fact is generally a good defence in ancient Hindu Law. There are however, certain cases in which some punishment, though lenient, is provided for by Manu, inspite of a plea of ignorance of fact : while enumerating penaties for perjury he goes on to lay down that "(one who does so) ***through ignorance*** (is to pay a fine of) two hundred panas," (19). Elsewhere, he lays down "He who through intimidation possesses himself of a house &c, shall be fined five hundred panas, (but if) through ignorance (agnanat) two hundred panas" (20).

(iii) Lunacy and Insanity.

In modern systems of law, offences committed by lunatics or insane persons are not generally punishable. It appears that in Hindu Law also some consideration is shown to them, though generally they are not wholly exonerated from punishment. So, while Manu is prepared to treat them with some consideration he does not let them off scotfree. He recommends whipping for women, infants, insane persons (unmatta), the aged, the poor and the sick. (21) But Yagnavalkya would go further. He lays down in unambiguous terms that in case the offence is committed by insane persons, or persons under the influence of intoxication, there shall be no punishment (Mohamadadiviradandanam) (22) Kautilya, on the other hand, does not wholly exempt them from punishment. He lays down, " If the offence is due to carelessness, intoxication or loss of sense, the fines shall be halved."(23) So also, " If abuse is due

(19) M. VIII, 120 & 121, (20) M. VIII. 264.
(21) M. IX, 230 (22) Y. II, 213 & 214.
(23) Kau III—Ch. nix—195.

to carelessness, intoxication, or loss of sense, &c., the fines shall be halved."(24)

(iv) **Infancy.**

It is a maxim of modern jurisprudence that an infant is not liable to punishment for any offence committed by him. According to all civilised codes of law, infants up to a particular age (generally 7 years) are held absolutely immune ; but from that age up to a certain higher age (usually 14) they are not punished unless it is definitely proved that they understood the nature and consequence of their act. In Hindu law also infancy is regarded as an exonerating circumstance, because the infant is incapable of distinguishing between right and wrong.

Manu lays down that if a person, except in a case of extreme necessity, defecates on the high way he shall be fined two Karshapanas and be compelled to remove the filth immediately. But a person in great difficulty, an old man, a pregnant woman, or a child shall be censured and be compelled to cleanse the place.(25) Here the infant is not punished but merely rebuked as he is incapable of distinguishing between right and wrong. In another place the lawgiver lays down that an infant should be whipped only for his offence.(26) Here though he is punished it is more in the nature of correction.

Yajnavalkya of course does not say in so many words that an infant should be exempt from punishment or should be treated with proper consideration. But he also appear to make the case an exception. For he lays down that at the time of inflicting punishment place, time, *age,* aud strength should be taken into consideration.(27)

Kautilya is emphatic on this point. He exempts the infant altogether. He lays down, " If the driver of a

(24) Kau. III—Ch., XVIII 193. (25) M. IX 282 & 283
(26) M, IX, 23.0 (27) Y. II, 75.

cart or carriage causing hurt is a *minor*, the master inside the cart or carriage shall be punished. In the absence of the master, any person who is seated inside, or the driver himself if he has *attained majority* shall be punished." (28)

Lastly we have the testimony of Mahavarata. Ani. Mandavya lays down the rule that until a boy reaches the age of 14 he is not a sinner, even if he commits a sin.(29) And if he be not sinner he should not be punished.

(v) Negligence.

"Negligence," says Salmond, "is rightly treated as a form of 'mens rea', standing side by side with wrongful intention as a formal ground of responsibility."(30) So when a man commits any offence unintentionally but negligently he is liable to punishment under modern criminal law. Generally the punishment is much more lenient than when committed intentionally, e.g., murder is capitally punished, but negligent homicide is more leniently dealt with. According to Hindu law also a man committing any offence through negligence is liable to punishment, though the punishment is less severe.

The punishment for murder according to Hindu law is death. But for causing injury to human life by rash driving the same punishment as in the case of theft (i.e. a fine of 1,000 panas) has been recommended. The lenity is obviously due to want of intention. Similarly, in case of death or injury resulting from negligence or incompetence of physicians it was culpable though the punishment provided for is comparatively light. It is needless to multiply similar instances.

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(28) Kan. IV, Ch. XIII 332.

(29) Mahavarata, Adi Parva, Ch. 107 & 108.

(30) Salmond-Jurisprudence, Ch XVIII, Sec. 140, P. 357.

CHAPTER IV

PUNISHMENT.

(1) Nature and Amount of Punishment.

We have seen that the main end of punishment according to Hindu law is deterrent. In this section we propose to deal with the nature and amount of punishment which should be inflicted in each particular case. It may appear from a perusal of the punishments recommended for various offences that they are rigid and inelastic and the hands of the judge were absolutely bound, so that he could not use his discretion in determining the nature and amount of punishment in every individual case. For every offence there seems to be a fixed punishment which could not be modified by him. This, however, is not the case. The Hindu law gave a long rope to the judge. Not only could he exercise his discretion but he was expected to do so. It may be reasonably inferred that the punishments recommended by the lawgivers are either maximum or minimum or a mere standard which should be followed as a guide. The judge was to take into consideration various things when he determined the amount and nature of punishment, e.g., the age of the offender, his knowledge, caste, status, wealth, physical power, mental condition, motive, and the nature of his offence, time and other extenuating or aggravating circumstances (if any).

Thus Gautama would advise the judge to take into consideration the status of the offender, his bodily strength (i.e. power of endurance), the nature of the offence, and whether it has been repeated. (1). According to Vasistha the place and time of the occurrence, the duties, age and learning of the offender, and 'the seat of injury' should be

(1) G. XII, 51.

properly considered by the judge when inflicting punishment. (2). Manu lays down, "Having fully considered the time and the place (of the offence), the strength and knowledge (of the offender), let him justly inflict that (punishment) on men who act unjustly." (3) Again, he says, "Let the (king) having fully ascertained the motive, the time and place (of the offence), and having considered the ability (of the criminal to suffer) and the (nature of the) crime, cause punishment to fall on those who deserve it." (4) According to Yagnavalkya, punishment should be inflicted after taking into consideration the nature of the offence, country (or locality), time, physical strength, deed (karma) and wealth. (5) Vishnu recommends that the punishment should be proportionate to the gravity of the offence (6) and should also be dependent on the caste, position and age of the offender. (7)

It is the opinion of Narada that "the perpetrator of a wrong action, or of a crime shall be let off with one half of the punishment due to his offence, if he admits the charge or if he makes his guilt known of his own accord. If on the other hand, a criminal has cunningly concealed his crime, and is convicted of it, the members of the court of justice will not be satisfied with his conduct, and the punishment inflicted on him shall be specially heavy. (8) Again, "after carefully considering the (nature of the) offence, the place and time and after examining the ability (of the offender), and the motive (by which he was actuated), he shall inflict these punishments" (9)

Brihaspati is quite clear and emphatic on this point. "No sentence," says he, "should be passed merely according to the letter of the law. If a decision is arrived at without considering the circumstances of the case, violation of justice will be the result."

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(2) Vas XIX, 9. (3) M. VII, 61.
(4) M VII, 126. (5) Y. I, 367. (6) Vi. III, 91
(7) Vi, V, 149.
(8) N. I, 245 & 246. (9) N. N. M., 38. (10) Bri. II, 12.

ii MODES OF PUNISHMENT.

Various kinds of punishments have been prescribed by the Hindu law, so that they might be severe or lenient according to the gravity of the offence, or in view of other considerations. The most common punishment, of course, is fine. Next come the capital punishments and mutilations. Imprisonment and fetters are some times met with. Beating or whipping is recommended for light offences or for those committed by infants, aged persons, &c. Public disgrace, including branding, is another kind of punishment. Censure, mild or strong, is to be applied in comparatively light offences or in the case of young and first offenders. Banishment is also recommended, specially in serious offences committed by the Brahmanas.

Manu has selected ten places of body where punishment should be inflicted in the case of non-Brahmanas ; but Brahmanas are to be banished without inflicting the least hurt. The places are the reproductive organ, the belly, the tongue, the hands, the legs, the eye, the nose, the ears, property or wealth and the whole body. (11)

According to Yagnavalkya, there are various kinds of punishment such as censure (saying fie ! fie !) harsh rebuke, pecuniary penalty or fine, and corporal punishment or *Vadha* (including death, mutilation imprisonment whipping &e.) They should be inflicted, one by one, or simultaneously according to the gravity of the offence. (12)

Narada quotes Manu as regards the ten places of punishment. (13) But elsewhere he classifies punishments into two classes, viz., corporal punishments and fines. According to him corporal punishments are of ten sorts, beginning with imprisonment and ending with death. Fine also may begin with a *kakani* and end with confiscation of the whole property. (14)

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(11) M. VII, 124 & 125. (12) Y. I, 367.

Like Yagnavalkya, Brihaspati also prescribes four kinds of punishments, viz., gentle admonition, (harsh) reproof, corporal chastisement, or one of the four gradations of fines. (15) But as regards the places of punishment he observes, "Both hands, both feet, the male organ, the eye, the tongue, both ears, the nose, the neck, one half of the feet, the thumb and index, the forehead, the lips, the hindpart, the hips These fourteen places of punishment have been indicated. For a Brahmana, branding on the forehead is ordained as the only kind of punishment." (16)

It is to be noted that none of these enumerations is accurate and exhaustive.

(iii) KINDS OF PUNISHMEMTS.

(A) FINE.

As has been already observed the most common punishment in Hindu law is pecuniary penalty or fine. It should however be borne in mind that these fines are not of the nature of damages or compensation for injuries caused to the aggrieved party. They are essentially of penal character and have nothing to do with compensation ; for these fines are to go to the state treasury and not to the injured person.

Fines vary from small sums to confiscation of entire property. As regards the three grades of fines, Manu says, "Two hundred and fifty panas are declared (to be) the first (or lowest) amercement, five (hundred) as the mean or (middlemost), but one thousand as the highest" (17) But Yagnavalkya gives a slightly different calculation. According to him, the highest amercement is equivalent to 1080 panas, half of that is middlemost, and a quarter is the first amercement. (18)

(13) N.N.M., 6 & 7. (14) N. N. M. 53 & 54.
(15) Bri. XXVII, 4. (16) Bri, XXII, 9 & 10.
(17) M. VIII. 138. (18) Y. I, 266.

It should be mentioned in this connection that when the whole property of a person is confiscated there are certain articles of which the king can not deprive even the worst offender. So Narada says, "The weapons of soldiers, the tools of artisans, the ornaments of public women, the various musical and other instruments of professional (musicians or other artists, &c.,) and any implement by which artificers gain their substance, must not be laid hold of by the king, even when he confiscates the entire property of a man or woman." (19)

(B). Corporal Punishment.

Corporal punishment has been recommended by the Hindu law-givers for serious crimes. According to Narada it is divided into ten sorts. It begins with confinement and ends with capital punishment. (20) In it are also included flogging, mutilation and other punishments inflicted on the body. As compared with the laws of other ancient and mediaeval states the Hindu law is the least prodigal in the prescription of corporal punishment. Of course Athens is an honourable exception.

With regard to the cruelty and barbarity in inflicting corporal punishment, there is very little to choose between the laws prevailing in different countries in ancient and mediaeval ages. The very thought of the ways in which some of these punishments used to be carried out would make one's flesh creep. But we must not shut our eyes to the fact that in those days of violence and rapine, the state found it difficult to check wickedness and cruelty. So in its anxiety to maintain peace and order—the first and foremost duty of a state by suppressing violence and highhandedness—the state was often forced to resort to cruelty and barbarity to strike terror in the heart of all potential criminals, Its object was, as we have seen elsewhere, mainly deterrent, though

(19) N 18th Tit., 10 & 11 (20) N. N. M. 53 & 54

the idea of prevention was sometimes present. Whether or not this object was attained is a different thing—though it appears it did succeed. It is also idle to speculate whether this was the best course to adopt. No doubt it caused great sufferings to the victims; sometimes they were given no chance to reform. Yet, if the greatest good to the greatest number is an ideal to be pursued, some allowance might be made for the cruelty and barbarity of those people; for they were all actuated by this noble motive. Here a word of caution is, perhaps, necessary. It is often represented that these punishments were nothing but the manifestation of 'lex-talions'. This, however, is not the fact—at least so far as the Hindu criminal law is concerned. The law-givers were not generally actuated by the idea of vengeance but by the laudable object of deterrence and prevention.

(C). IMPRISONMENT.

The most common punishments in ancient India as in other ancient and mediaeval countries, were fine, mutilation and capital punishment, where-as in modern times it is imprisonment. Imprisonment as a punishment was not so common, though in the law books there are frequent references of not only lockups where under-trial prisoners were kept but also of jails where convicted persons were incarcerated. So also from the custom of discharging prisoners from prisons on certain auspicious occasions it may be inferred that the number of persons kept in confinement was not inconsiderable.

The question may naturally arise in the mind of one, who has gone through ancient Indian criminal laws, how could the number of prisoners be large when the laws rarely prescribe imprisonment as a punishment for any offence. The apparent paradox will be solved when it is borne in mind that imprisonment is included in the corporal punishment (*sariradanda*) (21) Moreover,

(21) N., N M, 54.

it seems likely that imprisonment was prescribed in default of fine. We are told by Manu that in case a Kshatriya, or Vaisya or Sudra is unable to pay the fine imposed on him, he shall discharge it by physical labour, but a Brahmana shall pay it by easy instalments. (22) Yagnavalkya also seems to be of the same opinion. (23) It may be inferred that the state would not depend on the honesty and good faith of the judgment-debtor and set him free but would keep him in jail where he would have to pay off his debt to the state. That this is not a mere surmise will be clear if we turn to Kautilya about the discharge of prisoners where he lays down, "Those who are of charitable disposition or who have made any agreement with the prisoners may liberate them by paying an adequate ransom. Once in a day or once in five nights, jails may be emptied of prisoners in cosideration of the work they have done, or whipping inflicted upon them or of an adequate ransom paid by them in gold." (24)

(D) Exile.

Exile or banishment was used in ancient India for two purposes :—(a) to get rid of undesirable persons, (b) to serve as a punishment for offenders. In the latter case the first end is also present. Now as to ridding the state of undesirable persons, Manu recommends that gamblers (kitaban), actors (kusilaban), cruel men, heretics people following others' occupation, (Vikarmasthan) and wine sellers should be immediately banished from the state. (25) These men are to be banished not that they are offenders in a legal sense (though some of them may be even so in the eye of the law) but their presence is prejudicial to the best interests of the state—in a word they are undesirables. So also we are told by Kautilya that it is the duty of the state to employ spies to detect wicked persons living by foul means and to banish them as 'the disturbing elements of peace." (26)

(22) M IX, 229. (23) Y II, 43
(24) Kau. II-Ch-xxxvi—146 & 147.
(25) M Ix, 225. (26) Kau. IV PP. 265 ff.

As regards the second end, viz., as a means of punishment, banishment has been prescribed for some offences by the law-givers. But it has been generally recommended as Brahmanas guilty of capital offences.

It may be pointed out that unlike in modern times there used to be no particular place of exile and, the Hindu law did not provide for surveillance by state officials. The duty of the state ended with the banishment of the culprit out of the country. It did not care where the man went or how he lived. Its only concern was to see that the exile did not return.

Fustel de Coulanges in his 'Ancient City' has shown that in ancient communities exile meant more than mere bunishment from the state and the severance of connections with one's near and dear. Above all it meant that the unfortunate person was deprived of his share of family worship and of the protection of his family deities—the most painful sacrifice in that religious age. But it appears that in India it did not affect him in the same way, for his religion was a personal matter, and family or communal worship was not a marked feature of Hindu life. Yet to a Brahmana offender it was not a light punishment ; for generally the symbol of his offence was branded on his forehead, and wherever he went he was shunned like a noxious thing and was treated as an outcast.

(E) Branding.

Branding was generally used as a supplementary punishment to exile. Its object was to bring infamy on the culprit, so that wherever he might have gone the stigma would remain indelibly affixed. For particular crimes there were particular signs which were to be imprinted. Thus for drinking, a wine bowl was branded on the forehead, for murder in the case of Brichmana offenders the figure of a headless body, for adultery that of a female organ, and so on.

(F) CENSURE.

Censure was of two kinds—mild and harsh. Perhaps this was applied only in cases of petty offences and generally to first offenders as is now the case in British Indian criminal law.

CHAPTER V.

The Influence of Caste System on the Criminal Law.

The caste system was the basis of Hindu society and state. It is thus no wonder that it played an important part in the Hindu criminal law. While in the laws of many ancient and mediaeval states a distinction was drawn between the noble and the common, here in India this distinction took a different shape—viz., that of caste.

As a general rule, in the Hindu law when a person of the higher caste inflicts an injury upon another of a lower, the punishment is less severe than when a person of the lower caste causes injury to that of a superior, or in other words, the nature and amount of punishment varies with the caste of the offender and the offended. Naturally the Brahmanas were most advantageously situated, while the lot of the Sudras was very hard. Without trying to justify this discrimination of caste, some explanation may be offered. The reason of the immunity and privileges of the Brahmanas will be explained later on. As regards the extremely hard lot of the Sudras it is sufficient to mention that they were originally a conquered people, quite distinct from the Aryans, by reason of their colour, civilisation and culture. It speaks volumes in favour of the Indo-Aryans that they did not make a short work of the dark-skinned vanquished foes or convert them into slaves. They admitted them into the fold of Hindu society, though at the same time they were careful to maintain the purity of their stock. Naturally they hedged themselves with privileges which they denied to the conquered whom they regarded with greatest contempt, and suspicion, and in the arrogance of their superior culture and fair complexion they refused

to treat the dark-skinned non-Aryans as their equal in social and political matters. They found it necessary to keep them down by enacting severe laws against them. The least attempt on the part of the Sudras to improve their position and claim equality with the white skinned Aryans was sought to be suppressed with a strong hand. If they injured an Aryan they must be severely punished. But if an Aryan injured them the punishment need not be severe ; for after all what was the value of a Sudra's life and property ? This conflict of colour and culture does not appear to have been unnatural or strange. The Hindu laws were frankly partial to the Aryans as against the non-Aryans. The Hindus did not proclaim the equality of man from house tops and at the same time resort to lynching.

Yet it should be noticed that the criminal law was not always discriminatory. In respect of many crimes the same punishment was prescribed irrespective of the caste of the offender—barring of course the special exemption of the Brahmanas from corporal punishment. Thus in cases of theft, robbery, mischief, cheating, murder, treason, offences against public justice and morality and so forth, no distinction was drawn between non-Brahmanas.

As between the Kshatriyas and the Vaisyas, though the former enjoyed a greater consideration, the distinction was however slight and almost negligible. And it is no wonder that the ruling aristocracy would enjoy a little pre-eminence over the trading and cultivating classes. It is probable that the distinction of caste would have been wiped out in course of time if there had not stood the impassable barrier of colour. The presence of dark-skinned and less civilized non-Aryans was a great misfortune to the Hindu India.

A plausible explanation of this discrimination in punishment is given by Dr. Priyanath Sen where he

observes as follows; "..... a person belonging to a lower caste abusing or assaulting a person belonging to a higher caste was subjected to a heavier punishment than a person belonging to a higher caste found guilty of a similar offence in relation to a person belonging to a lower caste. This may to some extent be accounted for on the ground that in cases where insult or injury was a constituent element of the offence, the punishment was to be severe when the delinquent belonged to lower caste in relation to the complainant, for the outrage proceeding from the former against the latter made the insult more keenly felt and consequently deserved to be put down with a heavier punishment." (1)

There is no doubt much truth in all that Dr. Sen observes here; but it is difficult to accept the subsequent portion of his statement. He continues, "It should however, be remarked that it should be a mistake to suppose that this was the universal rule and that for every offence punishment increased in severity according to the inferiority of caste of the culprit. Thus we find that in cases where the offence was an outcome of moral depravity, but did not involve insult to the complainant as an element to be taken into consideration in measuring thd enormity of the crime, a person belonging to a higher caste who had less excuse for the same was generally imposed a heavier punishment. Thus dealing with punishment for theft, Manu said that a Sudra knowing what is right and wrong should get eight times the punishment liable to be inflicted on one ignorant of the same; a Vaisya having a similar knowledge sixteen times, a Kshatriya, similarly situated thirty two times; a Brahmana sixty-four-times or even full hundred times, or one hundred-twenty-eight times since he knows what is right and what is wrong. The Hindu law cannot, therefore, be accused of showing unmixed or unqualified partiality towards people belonging to higher caste in the administration of criminal justice."

(1) Hindu Jurisprudence—Lect. XII.

Dr. Sen here relies on slokas 337 and 338 of Chapter VIII of Manu to make such a sweeping statement. This, however, is, on the face of it, absurd. It is inconceivable that a Brahmana would be heavily punished. The whole spirit of the Hindu law is against such a theory. It is merely a pious recommendation to silence the moral scruples of the Brahmana law-giver. All that can be inferred from the two slokas is that while inflicting punishment, knowledge or ignorance of the offender should be taken into consideration. It is no use shutting our eyes to the fact that the Hindu criminal law is frankly partial to the higher castes.

PUNISHMENT OF THE BRAHMANA.

The position of the Brahmana, as already observed, was very advantageous in the eye of the law. It is decidedly partial to him. He is very leniently treated. Even for worst offences he is exempt from corporal punishments. (2)In such a case he is to be banished from the country with some mark of ignominy. The law-givers again and again emphasize that there is no corporal punishment for the Brahmana. To us this exemption of the Brahmanas from corporal punishment seems to be an unfair and unreasonable advantage. It goes against the modern canon of justice that a particular class of people should be exempt from severe punishments even when guilty of worst offences, while others are sometimes brutally punished for comparatively light offences. This preferential treatment of the Brahmanas appears to have been due lo the fact that in those days when men were extremely religious (and perhaps superstitious too) it is no wonder that the priesthood would enjoy special privileges and would be exempt from corporal punishments. This was also the case in Europe in the middle ages, where the clergy could not be tried in the courts of the state, however grave their offence. The famous quarrel between

(2) G. XII. 46 & 47 ; Ap. II, 27 ; 8. 17—19 ; M. VIII, 124, 379, 381 ; Vi. V, 2—8; Brih. XXVII. 11 & 12 ; N. 14 Tit. 9 & 10 ; 15 & 16 Tit 20 ; N. M. 41—45 & Mahavarata, Santi Parva, Ch. 56 ; Matsya Purana-Ch CCXXVII, 214 & 215.

Henry II of England and Thomas a Becket revolved on this question. They claimed to be tried in the church courts. This right was called the 'benefit of clergy.' The real significance of this right will be realised when we bear in mind that the church court administered a law, called Canon law, which was very lenient. There was no capital punishment or mutilation in the Canon law. In effect all clergy were exempted from corporal punishment. So the case of priesthood was not peculiar to India. Besides, the Hindu lawgivers were all Brahmanas, and it is natural that they would claim special privileges and exemptions for themselves. But the question is whether the kings would always accept their view. Though the evidence of Mricchakatika is to the contrary (Palaka, the tyrannical king condemns Charudatta, a Brahmana, to death) it would appear that as the judges were all Brahmanas who had a great hold on the people as well as on the kings, as a general rule, these exemptions were respected by the rulers.

It should, however, be borne in mind that inspite of the favourable position of the Brahmana, he was not wholly exempt from punishment. In his case the corporal punishment was commuted to branding and banishment. In lesser crimes also he was sometimes more leniently dealt with than people of other castes.

CHAPTER VI

SOME ASPECTS OF THE HINDU CRIMINAL LAW.

(i) *Can a man take the law in his own hand.*

In the infancy of society when a man was injured by another, he or his relatives would pursue the wrongdoer with an undying vendetta till the wrong was avenged. It is to put an end to this private vengeance that the state gradually took into its own hand the suppression of wrong doing and punishment of wrongdoers. The more a state became organised and powerful, the less it would tolerate private vengeance which is detrimental to public peace and order. How far was the ancient Indian state successful in suppressing private vengeance deserves our consideration.

As a general rule in ancient India an individual was not allowed to take tho law in his own hand ; but there were cases when he was permitted to do so, sometimes even encouraged by the law. Thus a creditor was allowed to harass the debtor even by the use of personal violence to realise his dues. (1) But it appears that this did not commend itself to later law-givers, who consequently, hedged this right of the creditors by great restrictions. (2)

So also according to Vishnu if a woman while in her courses touches others, she should be beaten and driven

(1) M. VIII, 48—50 ; Vi. VI, 19 ; Y. II, 40.

(2) Bri. XI, 63 ; Katyayana—of Recovery of Debt—V. May ; Rules for realising debt—V. Chin.

away. (3) Narada permits, and even encourages, men of higher castes to take the law in their own hand to punish men of low castes such as Svapaka, Meda &c., for insulting them ; for he lays down, "Should any such low person, abhorred by men, insult another man (his superior) that man himself shall punish him. The king has nothing to do with the penalty (to be inflicted on him)". (4) Brihaspati is also of the same opinion. According to him, "When a low person offends a man in high position by harsh words or the like, that man must not be persecuted by the king if he beats his aggressor." (5) Is it because the low castes were regarded to be out-side the pale of sacred law ? (6) Brihaspati would go much further. He is prepared to allow the aggrieved person to take the law in his own hand not only when a man of a low caste is the aggressor but in other cases also. For he lays down, "He who, having been abused returns the abuse, or having been beaten returns the blow, or strikes an offender down commits no wrong." (7) So also he would recommend the use of force to compel a man to do a work which he has promised to perform. (8)

Inspite of all these, however, the Hindu law did not generally permit self help or the taking of the law in one's own hand. So Narada says, "One who tries to right himself in a quarrel, without having given notice to the king, shall be severely punished and his cause must not be heard." (9)

(*ii*) *No one exempt from punishment.*

Inspite of the partiality of the ancient Hindu law towards people of higher castes, particularly the Brahmanas, there is one redeeming feature that no one, however

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(3) Vi V, 105. (4) N. 15 & 16 Tit., 11 & 12. (5) Brih. XXI, 14 (6) Dr Nares Sen Gupta's Sources of Law & Society in Ancient India—P. 93. (7) Brih. XXI, 4. (8) Brih. XVI, 16 (9) Nar, Intro 46.

high his position, was wholly immune from punishment for crimes. None, not even a virtuous and well-read Brahmana was exempt from punishment, though he could not be corporally punished. To emphasize this point the Hindu law-givers go so far as to maintain that even the king himself was liable to punishment; for it is laid down, "Where another common man would be fined one karshapana, the king shall be fined one thousand; that is the settled rule." (10) Of course this must have been a pious recommendation of which very few kings would take note; but the fact remains that in ancient India everyone was, at least theoretically, under the law and was liable to punishment for any wrong committed by him.

(*iii*) *The King can not punish the innocent.*

In ancient India the powers of the king were greatly circumscribed. Though in practice he often exercised despotic powers, in theory at least, he was bound by the law. The law clearly defined his powers and prerogatives. It laid down what he could do and what he could not. So naturally the law tried to secure the life and liberty of the people from the arbitrary exercise of royal power. It can not, however, be expected that in ancient time there would be laws like 'Habeas Corpus' in the Hindu law. Still it proclaimed in unequivocal terms the sanctity of life and liberty of the subject which even the king could not lawfully violate. It is difficult to say how far the kings respected this, though it may be assumed that generally it was observed. For in those days moral laws had a great hold on the people, not excluding the kings.

According to Manu if a king punishes one who should not be punished, and lets go an offender who deserves it, he is sure to bring infamy on him in this life, and after his death go to Hell (11). Vishnu, Yagnavalkya and

(10) M. VIII, 336. (11) M. VIII, 128.

Matsya also speak in the same strain (12). In Mahavarata also it is laid down, "If a foolish king punishes any (innocent) man according to his sweetwill he will be covered with infamy in this world and will go to Hell after death." (13) Again, Manu emphasizes, "When a king punishes an innocent (man), his guilt is considered as great as when he sets free a guilty man ; but (he acquires) merit when he punishes (justly)." (14)

Here the king is urged to be just in the infliction of punishment by an appeal to his moral and religious sense and by a threat of similar nature. If he inflicts unjust punishment there is no earthly remedy for it though sometimes the arbitary exercise of royal power would lead to rebellion. But the lawgivers do not rest content with moral sanction only, and go so far as to prescribe punishment for his violation of the sacred law. We learn from Kautilya, "When the king punishes an innocent man, he shall throw into water dedicating to God Varuna a fine equal to thirty times the unjust imposition ; and this amount shall afterwards be distributed among the Brahmanas." (15) Yagnavalkya too is of the same opinion. (16)

It appears that the principle that the king must not punish an innocent man was general in India. This has been emphasized in the Buddhist literature also. In Dharmadhwaj Jataka, (17) the king asks his general and former judge. Kalaka, "General, what is to be done now?" Kalaka replies, "Your Majesty, this man (who is represented to be aiming at the throne) must be put to death immediately." "But how can he be put to death unless he is found guilty of some serious crime ?" The same sentiment is expressed in Mahabodhi Jataka. (18) So also in Mahapadma Jataka (19) We find :—The King

(12) Vi. XIX, 43 ; Y I, 356 & M. Purana Ch. CCXXV, 2—6 & CCXXVIII, 216. (13) Santi Parva—Ch. 85 (14) M. IX, 249.
(15) Kau IV Ch XIII—235. (16) Y II, 307.
(17) Jataka (Ghosh), Part II No. 220. P. 118.
(18) Jataka (Ghosh), Part V No. 527—P. 140.
(19) Jataka (Ghosh) Part IV, No. 492—P. 134.

should not punish anyone without himself examining all matters, great and small, concerning the case. The King who punishes anyone without knowing anything, takes, as it were food full of bones, and goes to Hell. There is no difference between such a king and a man born blind. The blind man eats everything, he also does that. The king, who punishes, without properly judging, a man who should not be punished, and does not punish a man who deserves to be punished, is blind.'.

It may, therefore, be safely inferred that ordinarily the Indian king would not dare punish any innocent man without rousing popular hatred. And that was a suffi cient check upon the arbitrary exercise of royal power.

(*iv*) *The Prerogative of Pardon.*

It appears that in ancient India the king, as a general rule, did enjoy the prerogative of pardon : he could not pardon the guilty. The Lawbooks are emphatic on this point.

According to Manu, "One quarter of (the guilt of) an unjust (decision) falls on him who committed (the crime), one quarter on the (false) witness, one quarter on all the judges, one quarter on the king. But where he who is worthy of condemnation is condemned, the king is free from guilt, and the judges are saved (from sin); the guilt falls on the perpetrator (of the crime) alone" (20).

We have seen in the last section that it is the considered opinion of Manu that a king must not punish an innocent man, neither should he let off a guilty man without incurring popular opprobrium and punishment in the hereafter. If he sets free a guilty man he is as condemnable as when he punishes the innocent. Likewise, Yagnavalkya also observes that none can escape the

(20) M. VIII. 18 & 19.

punishment of the king, whether he be a brother, or son or preceptor, or father-in-law, or maternal uncle, if he transgresses the law. (21) Thus the king must not be a respector of persons ; his punishment must be sure and certain.

According to Narada "Neither for the purpose of gaining a friend nor for the acquisition of large wealth, must a wicked criminal be suffered to go free by the king Thus has Manu declared. By pardoning an offender, a king commits the same offence as by punishing an innocent man. Religious merit accrues to him from punishing (the wicked)" (22)

But it should not be inferred from the above that the king did not exercise his discretion to pardon any man in exceptional cases. In Mahavarata we find king Sudumna saying, "If you consider that sin is wiped out by being punished by the king, then you must know that if he forgives the offender his guilt is removed." (23) Evidently in exceptional cases the kings of ancient India appear to have pardoned the offenders. Whether or not the kings had the right of pardoning an offender wholly there can be little doubt that they would occasionally discharge prisoners from the jail. Thus we are told by Kautilya, "On the days to which birth star of the king is assigned, as well as on full moon days, such prisoners as are young, old, diseased, or helpless (anatha) shall be let out from the jail (bandhanagara), or those who are of charitable disposition or who have made any agreement with the prisoners may liberate them by paying an adequate ransom. Once in a day or once in five nights jails may be emptied of prisoners in consideration of the work they have done, or of whipping inflicted upon them or of an adequate ransom paid by them in gold. Whenever any new country is conquered, when an heir-apparent

(21) Y. I, 351. (22) N, N. M, 39 & 40.
(23) Santi Parva Ch. XXIII.

is installed on the throne, or when a prince is born to the king, prisoners are usually set free." (24)

This is corroborated by the evidence of Mricchakatika, where we find one of the executioners to whom Charudatta had been handed over for execution saying that his father had advised him not to execute a condemned prisoner hastily ; for "perhaps, some good men might give the money to set him free. Perhaps a son might be born to the king, and to celebrate the event, all the prisoners might be set free. Perhaps an elephant might break loose, and the prisoner might escape, in the excitement. Perhaps there might be a change of kings, and all the prisoners may be set free." (25) Although there is some confusion of ideas in the above, it is clear that prisoners used to be occasionally discharged from jails.

(v) Absence of Trial and Punishment of Animals & Inanimate Objects.

In almost all primitive systems of law we find that even animals or inanimate objects did not escape the process of law and punishment if unfortunately any injury was caused by them. If a man were killed by an ox, or if death resulted from the fall of a piece of wood, the ox or the piece of wood would be prosecuted and punished. Thus animals were tried and capitally punished for killing a man according to Hebrew, Persian, Early English and Mediaeval French laws. (26) According to Athenian law even inanimate objects were prosecuted and evidently punished for murder. We are told by Demosthenes, "...There is a fourth (tribunal) besides these, the court in the Prytaneum whose jurisdiction is as follows. If a stone or a piece of wood or iron or anything of the kind falls and strikes a man,

(24) Kau. II Ch. XXXVI 146 & 147.

(25) Mricchakatika Act. 10 P. 164.

(26) See 'Negligent conduct with respect to vicious animals'—Bk. II Ch V, Sec. 9 of my book.

and we are ignorant who threw it but know and have in possession the instrument of death, proceedings are taken against such instruments here." (27)

It must be said to the great credit of the early Hindus that no trace of such barbarism could be found in any of the law books. The Hindu law-givers would never hold an animal responsible for injury or punish it, not to speak of an inanimate object. The reason is not far to seek. They considered the criminal intent or negligence as the essence of crime, and would not punish even infants who did not attain the age of discrimination.

(vi) AIDING AND ABETTING.

Aiding and abetting of a crime was regarded as an offence by itself, for which punishment has been prescribed by the law-givers. If a man instigated or supplied weapons to a robber or murderer he was guilty of aiding and abetting in robbery or murder. Both Gautama and Manu prescribe the same punishment for an abettor in theft and the thief. (28) Yagnavalkya and Kautilya lay down the highest amercement for him who gives advice, implements and expenses to a thief or a murderer. (29) So also they prescribe double the punishment of Sahasa for a man who instigates another to commit Sahasa, but the punishment should be four times if he offers money for the crime. (30) Katyayana also holds the abettor liable to punishment. According to him "He who instigates or assists one who is ready to do a violent deed, gives him advice concerning it, shelters him, helps him with weapons, rice and advice at the time of detection. ··· shall be fined in proportion to his wealth." (31) These instances clearly show that aiding

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(27) Demosthenes Vol. III—Orations against Aristocrates—P.129
(28) G. XII, 49 ; M. IX, 278.
(29) Y. II, 276 ; Kau. IV Ch. XI, 227.
(30) Y II, 231 ; Kau. III Ch XVIII, 192.
(31) Katyayana—Robbery & other violence V, chin.

and abetting of an offence was regarded criminal and made punishable.

(vii) HARBOURING OF OFFENDERS.

Harbouring of an offender was also regarded as an offence in the same way as in the case of an abettor. Thus Manu prescribes the punishment for theft for knowingly giving food, shelter, &c., to theives. (32) Yagnavalkya and Kautilya recommend the highest amercement for knowingly giving food, residence, &c., to a thief or murderer. (33) Vishnu regards the harbourer of thieves equally criminal as the actual thieves and recommends capital punnishment for harbouring murderers. (34) Narada also regards the harbourer of thieves equally guilty as the actual thieves. (35) According to Katyayana he who harbours anyone who has committed violence should be punished with a fine in proportion to his wealth. (36) Matsya Purana also insists that the harbourers of thieves should be punished. (37)

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(32) M. IX. 271 & 278. (33) Y, II, 276 ; Kau IV Ch XI—227
(34) Vi. V, 19 & 16. (35) N., N. M., 13 & 14.
(36) Katyayana—Robbery & other violence—V. chin.
(37) M. Purana—Ch CCXXVII, 165—170.

CHAPTER VII

DETECTION OF CRIMES & APPREHENSION OF CRIMINALS.

It was the duty of the king in ancient India to maintain peace and order in his kingdom, so that the life and property of subjects might be secure. In fact, according to one theory the king was the servant of his people and received his dues from the people as his wages for the protection which he granted them. This was, of course, an extreme view. Still, there is no denying the fact that protection of the subject was the primary duty of the king. According to all theories, whether of Social Contract or of Divine Right, it is for protecting the subjects from the high-handedness and oppression of the wicked and powerful that the king was created. Anyone who disturbed peace and tranquillity of the country was to be punished with a strong hand. Spies were engaged by the state to detect criminals; agents-provocateur were appointed to incite suspects, or potential offenders to commit crimes and then to bring them to justice; and special officers and sentinels were appointed to arrest the offenders and guard the realm. As the result of all these elaborate precautions the country enjoyed peace, security and good order.

Manu enjoins, "Let the king who sees (every thing) through his spies, discover the two sorts of thieves (taskaran) who deprive others of their property, both those who (show themselves) openly and those who (lie) concealed." (1) It is thus the duty of the state to detect the two kinds of thieves and bring them to book. These two kinds of thieves include many kinds of offenders e. g., cheats,

(1) M. IX, 256.

burglars, robbers, bribe-takers, gamblers, palmists, (incompetent) physicians, (unscrupulous) artists, bullies, and so on. (2) They are to be regarded as thorns by the side of the people and as such they should be detected nay even instigated to commit crimes so that they may be brought under control. Thus Manu says, "Having detected them by means of trustworthy persons, who disguising themselves (pretend) to follow the same occupations and by means of spies, wearing various disguises, he must cause them to be *instigated* (to commit offences), and bring them into his power. Then having caused the crimes which they committed by their several actions to be proclaimed in accordance with the facts, the king shall duly punish them according to their strength and their crimes." (3)

In its zeal to repress the rogues the state would not hesitate to employ agents-provocateur to lead men astray, so that it would get sufficient proofs to secure conviction. This is repulsive from modern stand point.

That the police arrangement of the state was excellent will be evident from Manu who recommends that places frequented by thieves and other rogues, such as assembly-houses, water-houses, sweet-meat shops, hotels, inns, brothels, theatres, sacred trees, festive-gatherings, old and dilapidated gardens, forests and groves, empty houses —should be guarded by batches of moving and stationary soldiers and spies. (4) Not only should the king prevent these thieves from carrying on their nefarious trade, but should also apprehend and punish them with the help of old and reformed thieves. If the thieves were clever enough not to fall in the trap of the spies, the king should attack them by force and kill them, without the least semblance of trial along with their friends and relatives. (5) Not only was it the duty of the state to suppress

(2) M. IX, 257—260. (3) M. IX, 261 & 262
(4) M. IX, 264—266. (5) M. IX, 267—269.

crimes and apprehend criminals, but the public as well had their duties in the matter. According to Manu those who do not render assistance to the best of their ability when a village is plundered, a dyke is destroyed or a highway robbery committed should be banished from the state with their belongings. (6) The law is very severe with police officers and guards who do not exert themselves to prevent theft or robbery. For it is laid down that if those who have been appointed to police the realm or the vassals who have been ordered to suppress theft remain inactive or indifferent when a theft or robbery is being committed, shall be punished in the same way as thieves. (7)

Yagnavalkya also appears to emphasize the duty of the state to maintain peace and order by suppressing crimes and punishing the breakers of peace. According to him when a man has been secretly murdered an enquiry must be immediately held in which the sons and the friends of the murdered should be severally asked whether the deceased had any quarrel with anybody or whether his wife had illicit intercourse with any other man. They should be further examined as to whether he had an eye upon another man's wife or property, or what was his means of livelihood and with whom he was last seen. Persons of the neighbourhood should be similarly accosted later on. (8) So it appears whether or not any complaint was lodged by the relatives of the murdered man it was the duty of the state to trace out the criminal and punish him.

Brihaspati also entertains the same opinion. "Where the corpse is found, but the murderer can not be discovered, the king shall trace him by drawing an inference from previous enmities of his. His immediate neighbours and their neighbours, as well as his friends,

(6) M. IX, 274. (7) M. IX, 272.
(8) Y. II, 280 & 281,

enemies and relatives, shall be questioned by the king's officers employing towards them the (four) expedients of conciliation and so forth. The (guilty) person may be found out from his keeping bad company, from signs of crime committed and from the possession of stolen property. This has been declared the method of discovering murderers and robbers." (9) The recommendations of Narada are just the same as made by Manu and need not be dealt with.

Kautilya, likewise, emphasizes the duty of the state to maintain peace and order in the country by suppressing crimes and punishing criminals, actual and potential. In Chapter IV of Book IV (Suppression of the wicked living by foul means), he recommends that spies and agents-provocateur should be employed to detect various kinds of wicked people, who should be incited to commit crimes and then banished. In the next chapter (Detection of youths of criminal tendency by ascetic spies) he tells us how the state should detect and arrest robbers and adulterers. In Chapter VI of the same book he gives a list of persons who should be arrested on suspicion and others on circumstantial evidence. In the same chapter he lays down, "A commissioner (pradesta) with his retinue of *gopas* and *sthanakas* shall take steps to find out external thieves; and the officer in charge of the city (nagaraka) shall try to detect internal thieves inside fortified towns.

In Chapter VII Kautilya gives detailed rules for post-mortem examination of dead bodies in cases of suspicious deaths with a view to determine whether death was due to natural causes or suicide or murder. Various rules are laid down to ascertain the cause of death e.g. by poisoning strangulation drowning &c. An examination of these rules clearly show that the state was charged with the duty of instituting minute investigation and the apprehension of offenders.

(9) Brih. XXII, 34—36.

Like the canonical law-givers Kautilya also holds that it is the duty of the general public to assist the police or state officers in the apprehension of criminals. Thus he says, "Wayfares going along a high road or by a footpath shall catch hold of any person whom they find to be suffering from a wound or ulcer, or possessed of destructive instruments, or tired of carrying a heavy load, or tinidly avoiding the presence of others, or indulging in too much sleep, or fatigued from long journey, or who appears to be a stranger to the place, in localities such as inside or outside the capital, temples of the Gods, places of pilgrimage, or burial ground."

CHAPTER VIII

TORTURE TO EXTORT CONFESSION

Judged by modern standard, some of the punishments inflicted for serious crimes, in ancient India, as in other countries of the ancient and mediœval world, were brutal and barbarous. Impaling, burning and mutilation are cruel punishments before which even the bravest heart would quail. The victims of the law were often tortured in a most cruel manner so as to strike terror in the heart of other evil-minded people. Now the question naturally suggests itself whether torture was also used to elicit confession from under-trial prisoners or suspected persons. Canonical law books are silent on this point. Moreover, in ancient India if strong evidences were not forth-coming to secure the conviction of a suspected person, he would be asked to prove his innocence by oath or ordeal. So naturally one is tempted to presume that torture of accused persons with a view to obtaining admission of their guilt was unknown in this country. Kautilya, however, has devoted a whole chapter to "Trial and Torture to elicit confession," from which we learn that crual modes of torture were resorted to in order to extort confession. (1)

When the answers of the accused are not attested by reliable witnesses he should be subjected to torture. But it should not be applied indiscriminately. "Those whose guilt is believed to be true shall be subjected to torture." "Pregnant women, or who have delivered a child within a month should not be tortured. Torture of women shall be half of the prescribed standard." Ascetics and

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(1) Kau. IV Ch. VIII—P, P. 276 tp.

Brahmans well-read in the Vedas should not be tortured but should be subjected to espionage. Moreover, in the time of torturing an accused special care must be taken so that he is not tortured to death.

If the accused do not confess his guilt "each day a fresh kind of torture may be employed." Kautilya then describes the various kinds of torture which were in use in his days. "There are in vogue four kinds of torture (Karma) :—Six punishments (Shatdandah) seven kinds of whipping (kasa), two kinds of suspension from above(upari nibandhau), and water-tube (udaka nalikacha)." There are some persons who must not be subjected to torture. Ignormuses, youngsters, the aged, the afflicted, persons under intoxication, lunatics, persons suffering from hunger, thirst, or fatigue from journey, persons who have just taken more than enough meal, persons who have confessed of their own accord (atmakasitam), and persons who are weak—none of these shall be subjected to torture."

As a practical politician like Kautilya lays down minute rules and modes of torture to extort confession, it is not unreasonable to hold that such torture used to be resorted to in ancient India.

CHAPTER IX.

'JUS TALIONIS' NOT CONSPICUOUS IN THE HINDU CRIMINAL LAW.

Jolly in his estimate of Hindu criminal law expresses the opinion, "Capital punishments in various aggravated forms, such as impaling on a stake, trampling to death by an elephant, burning, roasting, cutting to pieces, devouring by dogs, and mutilations, are also frequently inflicted even for comparatively light offences. The 'jus talionis', which is so universally represented in archaic legislations, becomes especially conspicuous in these punishments. Thus a criminal is condemned to lose whatever limb he has used in insulting or attacking another." (1)

It takes one's breath away to find such expressions from a Sanskrit scholar like Jolly. It might have been expected that a person of his eminence would take a correct view of the facts. Certainly, no one would argue that the Hindu criminal law was perfect or that it was free from defects. But to say 'Capital punishments in various aggravated forms...are also *frequently* inflicted even for *comparatively light offences*' is a gross exaggeration of facts. It may be admitted that in Manu's time the number of capital offences was comparatively large (though still it was less numerous than in mediæval England or mediæval Europe). But we find that it has been greatly reduced by the time of Yagnavalkya and Kautilya. So an attempt to humanize the criminal law with the progress of civilisation is clearly traceable in the Hindu law. In the latter period capital offences do not exceed twenty-five. The number is insignificant if compared with that of England of the Eighteenth century. For we are told that "as recently as 1797 in England the number of capital offences

(1) Encyclopedia of Religion and Ethics (Hastings)—Vol. IV "Crime & Punishment" (Hindu) by Jolly.

without benefit of clergy was 160, and it rose to 222, when the efforts of Sir S. Romilly for reform in this matter succeeded only so far as to have pocket picking, which was capital above one shilling, taken out of the list of capital offences." (2) So also if we examine other systems of ancient and mediaeval criminal law we shall be in a position to appreciate the comparative leniency of the Hindu law.

Now we come to the nature of capital punishments. No one will deny that judged by modern standard the methods of capital punishment in ancient India were cruel and brutal ; but they were no more barbarous than those of other ancient and mediaeval states. An eminent scholar speaks of the punishments of mediaeval Germany, "An enumeration of the forms of mutilation used as punishments in the south of Germany (branding, cutting off of the hand, ears, the tongue, putting out of the eyes) is revolting, and the modes of death varied between breaking on the wheel, quartering in the crudest manner, pinching with red hot tongs, burying alive and burning. Even the executioners complained of the cruelty in the infliction of the punishments required of them." (3) The conditions in mediaeval France were no better. For "Undoubtedly the most common punishment was death. It was used for almost all serious crimes, with remarkable prodigality ... The methods of putting to death varied ; in general, they hanged the men and burned or buried alive the women. But this distinction was customary only, not mandatory ; there are instances of men being buried alive for the crime of theft, and men being burned for rape or bestiality. Counterfeiters were thrown into boiling water. In certain specially heinous cases, the death penalty was preceded by an ignominious torture or even a mutilation ;

(2) Criminology—Maurice Parmelee—Ch. XXV.—P. 410.

(3) A History of Continental Criminal Law—Part I Ch. IV Sec. 38 Cruelty of the Punishments.

thus often for abduction, and for all the worst crimes, notably that of '*lese majeste*', the offender was dragged around the locality before being hanged. At times also for heinous crimes, the offender, instead of being hanged, was decapitated or quartered ... ... Next to the penalty of death came that of mutilation. It varied infinitely in its application but was always inconceivably cruel." (4) In medieval an early modern England the punishments were hardly less cruel and barbarous. The punishment for treason beat the punishment of any other country in point of barbarity and cruelty. Of the punishments of ancient states except Athens, the less said the better. The Mosaic code was written in blood. The Babylonian code is no whit better. The punishments of Imperial Rome were no less cruel. Only Athens is an honourable exception. The Athenian law is characterised by a leniency and humanity found in no other system, ancient or mediaeval. This being the case we have no reason to be severe with Hindu law.

Then we come to the question whether capital punishments and mutilations were "*frequently inflicted for comparatively light offences.*" Now as regards the lightness or gravity of offences the standards differ in different countries and in different ages. What may seem to a modern German to be a light offence or no offence at all might have appeared to an ancient Hindu as a serious offence. The reverse is as well true. Yet we, with our modern ideas of criminality, shall generally notice a proportion between the gravity of the offence and the severity of the punishment prescribed in the Hindu law. For the most part capital punishment and mutilation have been prescribed for those crimes which, even according to our standard, are heinous. Moreover it must be remembered that in ancient times imprisonment as a punishment was not very popular. So the ancient lawgivers often prescribe capital punishment or mutilation

(4) Ibid Ch. VI 39 G.

for many offences which now a days may be punished with a long term of imprisonment. It must be admitted that in the case of the Sudras capital punishment or mutilation has sometimes been prescribed for even trivial offences for which men of other castes were more leniently treated. This is however a great blot on the Hindu criminal law and civilisation.

Lastly, we come to the question whether "the 'jus talionis', which is so universally represented in archaic legislations" is "conspicuous in the punishments" of the ancient Hindus. It is true in some special cases of assault or hurt the offender is condemned to lose the offending limb, but that is not the general or common punishment for assault or hurt. Moreover, when mutilation has been prescribed for some other offences, it is not necessarily of the offending limb and the motive for inflicting such punishment is not to satisfy the vindictiveness of the aggrieved party but to deter people from the commission of such heinous crimes or to prevent repetition. Thus no question of 'jus talionis' arises. It can, therefore, hardly be maintained that 'jus talionis' becomes ***specially conspicuous*** in these punishments.

CHAPTER X.

* THE COURTS.

In ancient India the same court administered civil and criminal justice, for no formal distinction was made between civil and criminal law.

According to Gautama the king, or his judge, or a learned Brahmana, should try all law suits ; so also in the opinion of Vasistha the king or his minister should administer justice. (1) Manu recommends that the king should personally attend to judicial proceedings assisted by Brahmanas and experienced councillors. But in the event of his inability, for some reasons, to try cases himself he may appoint a learned Brahmana to act in his place, assisted by three assessors. (2) Vishnu also is of the opinion that either the king himself should adjudicate cases personally, or should appoint a Brahmana to act for him. (3)

It would appear that up to the time of Vishnu there was one court—the king's court, presided over either by the king, or in his absence by his deputy, who must be a learned Brahmana. There is no mention of any subordinate court. It may thus be assumed that as in the early period of the Hindu history the states were very small, both as regards extent and population, one court was sufficient for the entire state. In course of

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* Dr. Pramatha Bannerjee has dealt with the administration of Justice in ancient India in Chapter XII of his 'Public Administration in Ancient India.'

(1) G. XIII, 26 ; Vas. XVI, 1. (2) M. VIII, I, 2, 9—11.
(3) Vi. III, 72 & 73.

time, with the growth of the size of the state and its population as well as of the complexity of society, one court became quite inadequate to cope with the growing demands of the state. The want was felt for the establishment of courts of inferior jurisdiction in various parts of the state. So we find that in the time of Yagnavalkya a regular grade of courts was set up. They were :—courts presided over by the king (nripenadhikrtah), assemblies of the people (pugah), corporations (srenayah) and gatherings or gens (kulani). In point of jurisdiction the preceding one is superior to the next following. Yagnavalkya has given us an account of the king's court. In his opinion the king, assisted by assessors, should daily administer justice. These assessors should be versed in the Vedas and the sacred law, truthful and impartial. If the king is unable to attend to the administration of justice he should appoint a learned Brahmana to act for him. (5)

Narada also gives us a list of courts, viz., gatherings (kulani), corporations, or guilds of merchants (srenayah), assemblies of people (ganah), one presided over by the king (adhikritah) and finally the king himself (Nripah). Of these one succeeding is superior to one preceding. (6) Thus 'the king is the fountain head of justice.' (7) The lawgiver describes the composition of the king's court when he says that "because it (judicial procedure) consists of these eight, the king, his dutiful officer, the assessors of the court, the law book, the accountant and scribe, gold, fire and water ; therefore it is said to have eight members." (8) According to Brihaspati,however, there are ten members of judicial procedure, viz., "the king, his chosen representative (the chief judge), the judges, the law (smritis), the accountant and scribe, gold, fire, water and king's own officer". (9) Then the functions of each of these ten members are explained. "The chief judge decides causes ;

(5) Y. I. 359 ; II, 1—3. (6) N. Legal Procedure, 7.
(7) N. Legal Procedure III, 6.
(8) N. I. Legal Procedure, 15. (9) Brih I, 4.

the king inflicts punishments ; the judges investigate the merits of the case. The law furnishes the decree, whether victory or defeat ; gold and fire serve the purpose of administering ordeals ; water is required for persons suffering from thirst or hunger. The accountant should compute the sum (in dispute) ; the scribe should record proceedings ; the king's own officer should compel the attendance of the defendant, assessors and witnesses." (10) Then he goes on to describe the qualifications of the various officers. "In a controversy he examines the (plaint in) question and the answer ; he speaks gently at first (prag vadati). Therefore he is called Pradvivaka. Men qualified by the performance of devotional acts, strictly veracious and virtuous, void of wrath and covetousness, and familiar with (legal) lore, should be appointed by the ruler as judges (or assessors of the court). Two persons thoroughly familiar with grammar and vocabulary, skilled in (the art of) computation, honest, and acquainted with various modes of writing, should be appointed by the king as accountant and scribe (respectively). A veracious man, who pays obedience to the judges, should be appointed (by the king) as his own officer to summon and to keep in custody the witnesses, plaintiff, and defendant." (11) The number of assessors should be odd, varying from three to seven. Thus he says, "That judicial assembly is equal (in sanctity) to a sacrificial meeting in which there sit seven or five or three Brahmans, who are acquainted with the world, with (the contents of) the Veda, and with the law." (12) So according to Brihaspati, the king or in his absence his chief judge, who should be a member of a twice born caste, shall decide lawsuits according to law and principles of equity, abiding by the opinion of the judges or assessors. (13)

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(10) Brih. I, 5—8.

(11) Brih. I, 12—15. (12) Brih I, 11.

(13) Brih. I, 24.

In the time of Brihaspati there were four kinds of law courts viz., stationary i.e. the court which met in a particular town or village, non-stationary or movable, composed of itinerant justices who went from place to place dispensing justice, furnished with the king's signet ring and presided over by the chief judge, and directed by the king and held in his presence. (14) Besides these, there were other courts of inferior jurisdiction, e.g., "relatives, companies (of artisans), assemblies (of co-habitants) and other persons duly authorized by the king." But these courts had not the power to try violent crimes or sahasa. There might be an appeal from one previous to one succeeding, so that from relatives there might be an appeal to companies and so on. (15) Thus he says, "When a cause has not been (duly) investigated by (meetings of) kindred, it should be decided after due deliberation by companies (of artisans); when it has not been (duly) examined by companies (of artisans), it should be decided by assemblies (of co-habitants); and when it has not been (sufficiently) made out by such assemblies, (it should be tried) by appointed (judges). Judges are superior in authority to (meetings of) kindred and the rest; the chief judge is placed above them; and the king is superior to all, because he passes just sentences." (16)

These were regular courts. Besides these there were extra-ordinary courts, e.g., "For persons roaming in the forest, a court should be held in the forest; for warriors, in the camp; and for merchants, in the caravan." (17)

In the opinion of Sukra also the king should personally attend to administration of justice in the company of Chief justice, Amatya, Brahmanas and Priest. (18) If he

(14) Brih. I, 2 & 3. (15) Brih I, 28 & 29.
(16) Brih. I, 30 & 31. (17) Brih. I, 25.
(18) Sukra—Ch. IV—Sec. V. 9—11.

cannot personally try cases he should appoint a learned and well qualified Brahmana to act in his place ; failing Brahmana, he should appoint a kshatriya and failing kshatriya he should appoint a Vaisya but he should on no account appoint a Sudra. (19) Like Brihaspati, Sukra also recommends that there should be three, five or seven assessors or judges. These assessors should preferably be natives of the places where the two parties reside and where the grounds of quarrel exist. (20) Besides the king's court there were other subordinate courts e.g. families, corporations, associations of inhabitants, and officers appointed by the king—the one succeeding being superior to one preceding—but the king is the highest court or the fountain-head of justice. (21)

Like Brihaspati Sukra also speaks of the ten members of the king's court. "The ten requisites in the administration of justice are the king, officers, councillors, smritisastra, accountant, clerk, gold, fire, water and one's own man. The Adhyaksha is the speaker, the king is the president, the councillors are the investigators. Smriti tells of the rules about recital of mantras, penance, gifts &c. Gold and fire are intended for the swearing of oaths and water for thirsty and nervous. The accountant is to count the money. The clerk is to write properly."(22)

There is a trial scene in Mricchakatika from which a fair idea of the composition and procedure of the court of Chief Judge (i.e. king's court) may be derived. It is presided over by the Chief Judge. He is assisted by a gildwarden and a clerk who put questions to the parties and record the main points and issues of the proceedings. There is a beadle who arranges the seats and summons all men whose presence is required by the court. But

(19) Sukra Ch. IV.—Sec. V—23—28.
(20) Sukra Ch. IV—Sec. V—46—51.
(21) Sukra Ch. IV.—Sec. V—57—62.
(22) Sukra Ch. IV.—Sec. V,—72—82.

the leading part is taken by the judge who decides all questions of fact as well as of law. He is to determine the sentence, but before passing it he is expected (at least in important cases) to refer it to the king.

From constant references to pleader in Sukraniti one may be tempted to think that in ancient India pleaders or legal agents were allowed in judicial investigations or trials. (23) But it appears that in reality that was not the case. There can be little doubt (from references to cannon and muskets & others) that Sukraniti in the present form was a production of late Muhamedan period. So the references to pleaders appear to have been interpolated in this period. There is no mention of pleaders in any of the Hindu or Budhist books. The Dharma Sastras are totally silent on this point. There is no mention of them even in Kautilya's Artha Sastra. So unless there is independent corroboration it can hardly be held, on the authority of Sukra Niti alone, that there were pleaders in ancient India, though it is possible that friends and near relations were allowed to help the parties.

(23) Sukra Ch. IV—Sec. V.—216—18 ; 219 ; 224—233.

CHAPTER XI.

LAWS IN ANCIENT INDIA.

(i) Laws not Exhaustive.

Laws, both civil and criminal, as stated in the Smritis, Puranas and other books, are not exhaustive. The law-givers themselves were conscious of this imperfection and laid down rules for supplementing the same. So Manu says, "If it be asked how it should be with respect to (points of) the law which have not been (specially) mentioned, (the answer is), 'that which Brahmanas (who are) Sistas propound, shall doubtlessly have legal (force)'." (1) As to who are the Sistas he answers, "Those Brahmanas must be considered as Sistas who, in accordance with the Sacred law, have studied the Veda together with its appendage, and are able to adduce proofs perceptible, by the senses from the revealed texts." (2) Then he goes on, "Whatever an assembly (Parishada), consisting either of at least ten, or of at least three persons who follow their prescribed occupations, declares to be law, the legal (force of) that one must not dispute. Three persons who each know one of the three principal Vedas, a logician, a Mimansaka, one who knows the Nirukta, one who recites (the Institutes of) the Sacred law, and three men belonging to the first three orders shall constitute a (legal) assembly, consisting of at least ten members. One who knows the Rig-Veda, one who knows the Yagur-Veda, and one who knows the Sama-Veda, shall be known (to form) an assembly consisting of at

(1) M. XII, 108. (2) M. XII, 109.

least three members (and competent) to decide doubtful points of law. Even that which one Brahmana versed in the Veda declares to be law, must be considered (to have) supreme legal (force, but) not that which is proclaimed by myriads of ignorant men." (3) Similar is the opinion of other law-givers. They all regard Parishada as the Source of law. According to Gautama it is an assembly of ten men having particular qualifications. (4) Vasistha and Baudhayana recommend the number to be ten, though they admit that it may be less. (5) According to Yagnavalkya the number should be four, though it may be less if the members are well-read in the three Vedas, or it may be more. Even a single man may occupy the position of the Parishada if he be extremely religious. (6) Likewise, Vishnu lays down that in crimes which have not been dealt with in his book, the king should administer punishment after consulting the Brahmanas. (7)

(ii) Classification of Law Suits.

The Hindu law-givers make some attempts to classify the subject matters of law suit. The classifications are, however, not quite accurate and exhaustive. According to Manu all cases fall under 18 titles of law, viz., (i) non-payment of debt, (ii) deposit and pledge (Nikshepa), (iii) sale by a person other than the owner, (iv) partnership, (v) resumption of gifts, (vi) non-payment of wages, (vii) breach of contract, (viii) cancellation of sale and purchase (ix) quarrel between master and herdsman, (x) dispute regarding boundaries, (xi) assault and hurt (danda parushya), (xii) abuse and defamation (vakparushya), (xiii) theft, (xiv) violence, including robbery (sahasa), (xv) adultery, rape and other sexual offences (strisangrahana),

(3) M. XII. 110—113. (4) G. XXVIII, 48—51.
(5) Vas. III, 20; Bau. I, 1, 5—13, 16. (6) Y. I, 9 & 10,
(7) Vi. V, 194. [Readers are recommended to refer to Dr. Nares Sen Gupta's Sources of Law and Society in Ancient India—Smriti & Parishada—PP. 42 ff]

(xvi) duties between husband and wife, (xvii) partition of inheritance, and (xviii) gambling and betting (Dyutamavaya). (8) Of these nos. 11—15 and nos. 18 are undoubtedly crimes and as to the rest many of them were regarded in the same light by the ancient Hindus. These are mere broad headings and they have been further subdivided into a number of offences for which proper punishments have been laid down.

Although Yagnavalkya has not explicitly classified the subject matter of law suits, yet a classification may be made from his treatment of the subject. It is almost similar to that of Manu. But he adds a new head called miscellaneous (prakirnaka). The classification of Narada is likewise similar. He also divides the subject matter into eighteen heads. These eighteen are again sub-divided into one hundred and thirtytwo branches. (2)

Brihaspati also makes a similar classification. His treatment of the subject is however more scientific. He divides lawsuits into two broad heads, viz : Those originating in or relating to wealth and those relating to injuries. These again have been subdivided into eighteen, as by other sages (10).

(iii) Laws are Comprehensive.

As has been observed before, the laws laid down in the Hindu law books are not exhaustive, but they are comprehensive and cover a wide range of human activities. Practically nothing has escaped the searching eye of the Hindu law-givers. They have provided for all conceivable circumstances. Even general sanitation and public convenience have received their proper share of attention. They have not forgotten to tackle problems like cruelty to animals or injuries to trees and plants. But the main defect is that offences are not properly classified and scientifically arranged.

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(8) M. VII, 3—7. (9) N. Intro. 16—25.

(10) Brih. II, 5—10

BOOK II.

AUTHOR'S NOTE.

As observed in Book I, the Hindu law-givers, did not draw any formal distinction between civil and criminal law. They divided the subject matter of law-suits under eighteen titles or heads, under each of these titles they dealt with the laws concerning specific subjects. To us this arrangement seems to be somewhat confusing and unscientific. So ; for the sake of convenience and better understanding, the laws relating to crimes or offences have been arranged and classified acc ording to modern system, specially that of the Indian PenalCode. It should, however, be mentioned here that only laws relating to comparatively important offences have been dealt with in this book. Many provisions of little import or sometimes even puerile, have been ignored. Moreover, in order to have a better appreciation of the Hindu law, it has been compared, wherever possible, with the laws of other important countries of ancient mediaeval and even early modern periods. It should be noted that in the case of England laws up to the time of Blackstone (i.e. later part of the eighteenth century) are discussed and compared.

CHAPTER I.

OFFENCES AGAINST THE STATE AND THE KING.

In all ages and in all countries, offences against the State or the King have been considered most heinous. For the preservation of the state and society it is incumbent upon the rulers and the legislators to see that no violent attack is made upon the government, or the King who stands as the representative of the people. So the slightest attempt in this direction must be stamped out with a strong hand. Criticism of particular acts of the government and constitutional agitation to reform it must, however, be distinguished from an attempt at subversion of the government, or a direct attempt on the King's life, or the betrayal of the country. In modern times the first is admitted on all hands to be legitimate and is even considered necessary, as otherwise with the progress of civilisation the administrative machinery would become antiquated and ill suited to the requirements of good government. As regards the second point, there is a unanimity of opinion among the thinkers of modern times, barring a few whom Jethro Brown and others call anarchists (1) that no State can tolerate such acts as are directly inimical to its interests. But the ancient and mediaeval political thinkers and rulers did not, as a rule, make any such distinction. To them legitimate criticism of the acts of government was as criminal or pernicious as a direct attack on the State or the King. They were naturally determined to root out both with a strong hand.

(1) Challenge of Anarchy—"Underlying Principles of Legislation."

No consideration of family tie or rank and merit would persuade them to forgive the offender. Not only that; they must make an example of the fate of such offenders so that no one would dare tread on their footsteps. Their sole aim was to create an impression. So every where these offenders were punished with the extreme penalty of the law. The ancient and mediaeval lawgivers generally prescribe the most shocking and cruel death for the unfortunate victims. The punishment laid down by ancient Hindu lawgivers are, however, less cruel and barbarous than those obtaining in other countries in ancient or mediaeval period. They prescribe the punishments of beheading, or impaling, or burning alive, or mutilation, or fine. Surely these are less brutal than the punishment of flaying alive as in mediaeval France. The punishment in mediaeval and early modern England was still more shocking...the offender was first of all hanged by the neck, next he was brought down while still alive, then his entrails were taken out and burnt: the head was next severed and the rest of the body was cut into four parts, and all these were to be placed at the disposal of the King! [Blackstone ..Bk. iv ch. vi p. 92]. Nor was in India the sin of the father visited upon his children. The offender's property was not forfeited to the state, or his family reduced to starvation or begging, as in Athens and France. In the latter country the vendetta of the state was not satisfied even with the death of the offender and the forfeiture of his property. "The offender's children are to be exiled, there to suffer a merited death. If the prince spares the lives of the children, the latter are none the less branded with infamy for the rest of their lives, stricken with civil death." [History of Continental Criminal Law...Part I ch. vi 39f.] The condition was little better in Athens, where "the body of the condemned was cast out of the country without burial, his house was razed to the ground, and the infamy descended to the children. Traitors might be proceeded against after their death. There would be a solemn trial and after condemnation the bones would be dug up and cast out of Attica." [Orations of

Demosthenes vol. iii App. viii pp. 339-40] In the Roman Empire the unfortunate offender had often to minister to the pleasures and amusements of the Roman people by gladiatorial combat or by being torn into pieces by wild animals in the public theatre. Besides, the memory of the offender became infamous. [Justinian Bk. iv. Title xviii, P. 3] Such, however, was not the case in ancient India.

It may be observed that the Hindu lawgivers did not give a particular name like 'treason' or 'prodosia' or *'lese majeste'* to the offences against the State or the King. It is only in a very late work, Sukraniti, which was composed in the late Mahomedan period, that there has been an attempt to classify offences against the King.(2) Sukra mentions fifty *chhalas* or offences against the King. Many of these offences are evidently new creations or outside importations, for they have not been noticed by earlier lawgivers.

It may be urged here that though the punishments recommended by the Hindu lawgivers for the offences against tho King and the State were less barbarous than those obtaining in other ancient and mediaeval countries, in practice there would be very little to choose between them. In other words the Hindu despots would not hesitate, in cases of treason, to disregard the "pious recommendations of the Sastras" and to inflict the most barbarous punishments. This contention though ingenious is hardly reasonable. While admitting that occasionally some tyrannical Kings might have treated the Sastras with scant regard, as a rule the law was respected. For, nowhere in ancient and mediaeval countries was there a class of guardians of law more independent and more powerful than in Hindu India. The Brahmanas who were the lawgivers of ancient India were also entrusted with the administration of justice. Except in rare cases they would not for a moment tolerate any attempt

(2) Sukra—Ch. IV Sec. V 142—160.

on the part of the King to disregard the Sastric injunctions. And if anywhere in the world the judges were not subservient to the monarch, it was in Hindu India. The Brahmana authors might have been actuated by vanity or an exaggerated sense of their own importance or power, still there can be little doubt that they were held in high esteem by the rulers and the people. The story of Krishna washing the feet of the Brahmanas might have been a mere myth manufactured by the latter, still there can be no denying the fact that the sanctity of their person and property was no less respected than that of the Roman Tribune. Moreover, these Brahmanas, however high their social and political pretensions might have been, were a class of men who were absolutely indifferent to worldly pleasures and wealth (a unique phenomenon in the world), and as such had the least reason to care for the frowns and favours of the King. So the Brahmana judges and assessors would not hesitate to check the autocratic leanings of the King. Call it a Brahmana oligarchy or not, the independence of the Brahmana judges was a fact in Hindu History.

We shall now proceed to deal with the various offences against the King and the State and punishments prescribed for them. These may be classified under three heads (i) offences punishable with death, (ii) those punishable with mutilation, and (iii) those for which fines were prescribed.

I. OFFENCES PUNISHABLE WITH DEATH.

(A) Attacking the King.

The early Hindu lawgivers are silent as to whether a direct attack on the person of the King was punishable, or the nature of its punishment. As would be presently shown, death sentence was provided for much lesser offences. It would not thus be unreasonable to suppose that an attempt on the life of the King was regarded

as a very heinous offence entailing capital punishment in a most cruel manner. This is corroborated by Narada, a later law-giver, who lays down, "When an evil-minded man assails a wicked King even, he shall be (fastened) on a stake and burnt in fire; for he is more criminal than one who has committed a hundred times the crime of killing a Brahmana." (3) In this connection it would not be out of place to mention that by 25 Ed. III C.2, even "compassing and imagining the death of the King" was made treason. No similar provision however is found in the ancient Hindu law.

(B) Hostility to the King.

Like the laws of other ancient and mediaeval countries hostility, active or passive, to the King was regarded as a high crime by the Hindu lawgivers. Manu would prescribe capital punishment in an aggravated form even for opposing the wishes or commands of the King (pratikuleshu ca sthitau), while Kautilya lays down that "any person who aims at the kingdom, or who creates disaffection in forts, country parts, or in the army shall be burnt alive from head to foot." (4) Vishnu would extend capital punishment for attacking not only the King but even his ministers, forts, treasury, army, kingdom and allies. A stranger to the royal family who attempted at the throne was to be similarly punished. (5) Brihaspati, however, is more lenient. He prescribes banishment for a person who is inimically disposed towards the King. (6) This punishment was apparently not meant for active hostility, such as revolt, defiance and creating disaffection in the country. Matsya Purana also lays down capital punishment in an aggravated form for interfering with the authority of the King. (7)

(3) N. 15 & 16 Tit., 31

(4) M. IX, 275; Kau. IV Ch. XI—227. (5) Vi. VII, 18 & 19; V, 14

(6) Brih. XVII, 16. (7) M. P. ccxxvii, 185.

Not only was conspiracy or rebellion against the King a capital offence in Babylonian law, but even omission to arrest and bring to justice such conspirators, being privy to their plots, was equally punishable.(8) The Persian law prescribes instantaneous death for the rebels against the royal authority.(9) In Roman law the 'Twelve Tables' lays down death penalty for even seditious gatherings by night in the city. As there was no King in the Republican period, conspiracy against the State or the constitution was a capital offence. In the Imperial period the penalty for undertaking any enterprise against the Emperor was loss of life and infamy after death.(10) In Athenian law, not only was an attempt at establishing a despotism, subverting the constitution capitally punished, but there was a special decree which condoned and even encouraged the killing of any man who attempted to establish despotism or his aiders and abettors. (11) In mediaeval France, a man revolting against the King was denied even a form of trial and was flayed alive, his property was confiscated and the children exiled. Even his advisers or those who were privy to his plot would share the same fate.(12). In England, "Levying war against the King in his realm" was treason according to 25 Ed. III c.2.

(C) Helping and Instigating the Enemies of the King.

According to Manu those who help the King's enemies or conspire with them shall be capitally punished. (13) Kautilya prescribes burning to death for those 'who instigate wild tribes or enemies against the King.'(14) Matsya Purana also recommends capital punishment for helping the enemies of the King.(15)

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(8) Ham., 109.

(9) Dhalla—Ch. I. Criminal offences & their Punishments.

(10) T.T. 8^{25} (Nas.) ; Just. IV Tit. XVIII, 3.

(11) Demos. Vol, III. App. VIII, P.P. 338—340, (12) Cont. Cr. L. Part I Ch. VI 39f. (13) M. IX, 232 & 275. (14) Kau. IV Ch. XI 227. (15) M. P. ccxxvii 165—170.

In Athens assistance given to the enemy was capitally punished as 'Prodosia', while the same punishment was recommended for exciting an enemy against the Roman people by the Twelve Tables.(16) According to 25 Ed. III c.2, "adhering to the King's enemies in his realm, giving to them aid and comfort in realm or elsewhere" was a treason in England.(17)

(D) VIOLATING THE MODESTY OF THE QUEEN.

Manu is silent on this point. But Yagnavalkya, Kautilya, Agni and Matsya Puranas lay down death by burning for adultery with the Queen.(18) Narada, however, does not go so far. He lays down the excision of the organ as the punishment for the offence.(19) According to English law [25 Ed. III c. 2] not only violating the Queen, but the eldest unmarried daughter and the wife of the eldest son of the King was regarded as treason.(20)

(E) OTHER OFFENCES AGAINST THE KING PUNISHABLE WITH DEATH.

According to Manu and Matsya Purana, one who destroys or breaks open (bhedakan) royal treasury or arsenal or steals or plunders royal treasure, elephants, horses, &c. should be punished with death.(21) In England, by 12 Geo. III c. 24, to set on fire or destroy any ship of war belonging to the King, or his arsenals, magazines, victual offices or military and naval stores, or ammunitions &c. or causing or aiding, abetting, procuring of such offence was made felony without benefit of clergy (i.e. punishable with death). (22)

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(16) Encyc. of Rel. & Eth. vol. IV—Crime & Punishment (Greek) ; T. T. 9^5 (17)Black IV Ch. VI. P. 82
(18) Y. II. 282 ; Kau. IV Ch. XIII—234. ; Ag. P. ccxxvii 56—58 ; & M. P. ccxxvii, 201.
(19) N. 12 Tit. 73—75 (20) Black IV Ch. VI—P. 80
(21) M. IX, 275 & 280 ; M, P. ccxxvii, 165—170, 172.
(22) Black. IV Ch. VII. P, 101.

Katyayana recommends capital punishment for personating the King. (23)

Kautilya recommends the cutting off of the tongue for insulting the King, while Yagnavalkya lays down either cutting off of the tongue and banishment or the highest fine for vilifying the King. (24) But it appears that in later times there was a tendency to regard this offence with greater severity. For we find Narada and Katyayana prescribing death penalty for this offence.(25) In England contempt and misprisions against the King's powers and government by speaking or writing ill against them and otherwise were punished in Blackstone's time not only with fines and imprisonment, but with pillory or other infamous corporal punishments.(26)

2. OFFENCES AGAINST THE KING PUNISHABLE WITH MUTILATION.

For betraying or disclosing the King's counsel cutting off of the tongue has been prescribed by Kautilya, while Yagnavalkya prescribes banishment in addition.(27)

While Narada has laid down death penalty for using abusive words to the King, he recommends cutting off of the tongue or forfeiture of entire property for a man censuring a King 'devoted to the discharge of his duties.' (28) Does he imply that if the King was not devoted to the discharge of his duties anyone might censure him for his dereliction of duty without incurring the least penalty? If so, we can not praise too highly the patience of the ancient Indian Kings who would not resent direct censure

(23) Kat. Robbery & other violence—Viv. Chin.

(24) Kau. IV Ch. XI, 228 ; Y. II, 211 & 302.

(25) N. 18 Tit., 32 ; & Kat. Robbery & other violence—Viv. Chin

(26) Black. IV—Ch. IX—P. 122.

(27) Kau. IV—Ch. XI—228 ; & Y. II, 302.

(28) N. 15 & 16 Tit., 30.

CHAPTER II.

OFFENCES AGAINST PUBLIC JUSTICE.

The laws laid down by the Hindu lawgivers relating to the offences against Public Justice are comprehensive to a great extent. Even a casual perusal of these laws can not but impress the reader with the high ideal of administration of justice of the ancient Hindus. They reveal a picture of a highly advanced civilization and a well-organised state with elaborate rules for ensuring justice between man and man. They further show that the ancient Hindus took great care to suppress crimes and punish criminals, while they spared no pains to see that no innocent man was punished.

1. FALSE EVIDENCE.

The Hindu lawgivers have taken great pains to impress on all the duty of giving true evidence. They assure that witnesses who give true evidence go to heaven and enjoy eternal bliss, while those who bear false witness are sure to come to grief in the life hereafter for they commit a great sin. They advise the judges to praise the virtue of giving true evidence and to warn witnesses with the fearful picture of after life awaiting those who bear false witness. Not content with religious and moral sanctions only they have laid down a series of laws

inflicting various punishments according to the motive and the gravity of the offence. In a single case only false evidence is condoned, nay even encouraged, that is to save the life of a person.(1) To our modern ideas this seems unjustifiable and unreasonable.

Now as to the punishments for giving false evidence Gautama says that a perjuring witness must be reprimanded and punished; Apastamba also charges the King to punish a false witness. But neither specifies the nature of the punishment.(2) According to Manu ordinarily the punishment for giving false evidence is banishment for the Brahmanas, while fine shall be added in the case of non-Brahmanas. The amount of fine is to be determined by the motives which actuate the witness to perjure. Thus when a person gives false evidence out of lust or sexual consideration, the fine shall be 2,500 panas; 1,500 panas, when out of anger or spite; 1,000 panas when out of greed or terror or affection; 250 panas, when out of mental agitation or ignorance; and 100 panas when out of inadvertance.(3) Apparently there is an attempt at discriminating between the different degrees of guilt in graduating the punishments.

Vishnu recommends forfeiture of entire property for false evidence. (4) Yagnavalkya prescribes fine for non-Brahmana offenders, and banishment in the case of Brahmanas. But in the case of the non-Brahmana witness who refuses to depose, influenced by avarice or fear a penalty 8 times heavier than that of the accused has been prescribed by him, but a Brahmana shall be banished for the same offence.(5) Though Narada does not specify any punishment for false evidence, he is equally emphatic on this point. The picture which he asks the judge to draw before the witnesses of the punishments after death

(1) G. XIII, 24; M. VIII, 104; Y. II, 83.
(2) G. XIII, 23, & Ap. II, 11, 29, 8.
(3) M. VIII, 120 121, & 123.
(4) Vi., V. 179.
(5) Y. II, 81 & 82.

of the false witness is very terrible. Moreover he says, "He who conceals his knowledge (at the time of trial), although he has previously related (what he knows) to others, deserves specially heavy punishment, for he is more criminal than a false witness even." (6) Brihaspati recommends a fine of double the amount in dispute for bearing false witness.(7) For knowingly giving false evidence Matsya Purana prescribes a fine of 800 panas, but the recommendation of Agni Purana is more severe. It lays down fine and banishment for Brahmanas, while for others fine and corporal punishment are provided.(8)

The punishments for perjury in other ancient and mediaeval states may as well be examined in this connection. In Babylonian law, death was the punishment for false evidence in cases involving life and death, but in ordinary cases relating to disputes about corn or silver, double the penalty involved in the particular case was provided for.(9) In Mosaic law the punishment for false evidence was the same as in the case of the actual offender.(10) In Athenian law perjury was considered as a civil wrong demanding a civil remedy, even though disfranchisement might result as a further consequence. "On the other hand, a witness who falsely swore to the service of a summons was liable to criminal prosecution and might in a gross case be punished even with death." (11) In Roman law the 'Twelve Tables' prescribed the death penalty (hurling from the Tarpeian rock) for this offence.(12) In Mediaeval France the false witness was punished with the pillory, a long term of imprisonment or a fine.(13) In England the punishment for perjury varied at different periods. "It was anciently death,

(6) N. 1 Tit., 197. (7) Brih. XXII, 15.
(8) M. P. CCXXVII, 199; & Ag. P. CCXXVII, 1—17.
(9) Ham., 3 & 4. (10) Deu. 19 16—21
(11) Demos. III, App. VIII, P. 344. (12) T. T. 8 23 (Nas).
(13) Cont. Cr. L. Part I—Ch. VI—39f.

afterwards banishment, or cutting out the tongue; then forfeiture of goods; and it is fine and imprisonment, and never more to be capable of bearing testimony" (in the time of Blackstone.) (14) So the punishments in ancient India for this offence do not seem to be unduly severe in comparison with other systems of law.

2. SETTING UP FALSE EVIDENCE.

Although the lawgivers appear to have bestowed much attention on perjury yet they are silent about setting up false evidence to win a cause. We have only the opinion of Katyayana who recommends that the suborner should be punished with forfeiture of his entire property and should be defeated in the case. (15)

In England, 5 Eliz. c-9 prescribed the penalty of perpetual infamy and a fine of £ 40 for setting up false evidence: and in default of the payment of fine the offender was to be imprisoned for 6 months, and had to stand in the pillory with both ears nailed to it. (16)

3. DISHONESTLY MAKING A FALSE CLAIM IN COURT.

According to Manu if a dishonest person out of greed demands an article from another without having kept it as a deposit, he shall be punished as a thief (i. e. with corporal punishment when the article claimed is valuable—Kulluka), or with an equal fine (when the article is not of great value—Kulluka). (17) In such cases Vishnu, however, does not make any difference he prescribes the punishment for theft only, while Narada ratifies Manu's opinion. (18)

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(14) Black. IV—Ch. X—Pp. 137 & 138.

(15) Katyayana—Witnesses—V. May. (16) Black. IV—Ch. X—P. 137.

(17) M. VIII, 191. (18) Vi: V, 171; & N. 2nd Tit., 13.

If a man falsely claims a debt, which is not due to him, he shall be punished with a fine of double the amount claimed. This is the opinion of Manu. (19)

According to Yagnavalkya, if a man falsely claims an article from another as being an article which he has lost or which has been stolen, he shall be fined to the extent of one-fifth of the value of the article, in case he can not substantiate his claim, but Katyayana holds that he must be punished as a thief. (20) Vyasa on the other hand recommends a fine of twice the value of the thing falsely claimed and Brihaspati seems to support him. (21)

4. NON-ATTENDANCE IN OBEDIENCE TO AN ORDER FROM THE COURT.

In ancient India when a man brought an action against another, the court would issue a summons to the latter to appear and make his defence. If the accused (or the defendant) after having received the summons absconded, the judgment was to be given against him and the king was to punish him. This is the law of Narada. (22) And according to Brihaspati if he did not attend out of pride he was to be punished according to the nature of the action or accusation. (23)

Witnesses were also summoned by the court to give their evidence. If any witness, after having been summoned, failed to appear to give evidence in respect of a money claim, he was, according to Manu, to pay the debt to the creditor, and a tenth part of it as a fine to the king, unless his absence was due to disease. That is also the recommendation of Brihaspati.(24) Though the law-givers do

(19) M. VIII, 59.

(20) Y. II, 171 ; & Katyayana—Sale without ownership—V. Chin.

(21) Vyasa—Sale without ownership—V. May ; Brih. XIII, 5.

(22) N. I, Legal Procedure, 59. (23) Brih. II, 35.

(24) M. VIII, 107 ; & Brih. VII, 31.

not say anything about criminal cases, there can be little doubt that in those cases as well a defaulting witness was to be punished, and the punishment was to vary according to the nature of the offence.

In Athenian law "if a witness who had received due notice, failed to attend, he was solemnly called by an officer of the court, and a fine of 1000 drachm was imposed upon him: besides which, he was liable to an action at the suit of the party injured." (25)

5. INTENTIONAL OMISSION TO APPREHEND AN OFFENDER ON THE PART OF THE PUBLIC.

The lawgivers insist that when a grave crime is being committed it is the duty of everyone, be he a relative or a stranger to the injured, to try his utmost to prevent it and to apprehend the criminal. If anyone does not exert himself, he must be punished for his default.

Manu lays down that if anyone on hearing that a village is being plundered, or an embankment (Hita) is being destroyed, or a highway robbery is being committed does not pursue the offenders as best as he can, he shall be banished from the country. (26) According to Kautilya, he who lets off an offender in consideration of a bribe shall be punished with a fine amounting to 8 times the bribe. (27) Yagnavalkya lays down that if a man lets go a paramour of his female relative to hide his own shame, he shall be punished with a fine of 50 panas, but if he releases him in consideration of a bribe, he shall have to pay a fine of 8 times the illegal gratification. (28) According to Narada if anyone suffers a thief to escape, though he is

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(25) Demos. III, App. IX, P. 391

(26) M. IX, 274, (27) Kau.—IV—Ch. XII—230. (28) Y. II, 301.

capable of preventing him, he is equally guilty as the criminal. (29)

Although only a few offences have been specifically mentioned, it may be reasonably believed that these laws apply to other crimes also. It is a great defect of the Hindu lawgivers that they are never careful or exhaustive at the time of enumeration. It is unthinkable that while a man is punished for suffering a thief or an adulterer to escape, he will escape scotfree if he do not arrest a murderer or other heinous offenders.

6. OMISSION TO RENDER ASSISTANCE FOR THE PREVENTION OF CRIMES.

In a case where a person struck by another piteously appeals for help from a third person if the latter renders no assistance or remains indifferent, he shall bear double penalty. This is the recommendation of Vishnu. (30) According to Yagnavalkya when a man does not render help to a person seeking protection against thieves, he shall be punished with a fine of 100 panas, while Narada regards him as an accomplice in the crime. (31)

So not only was it the duty of the public to apprehend a criminal but also to help the aggrieved person.

7. FALSE ACCUSATION.

If a person brought a false accusation against another he was punishable in ancient India. Manu lays down that if a complainant after preferring an accusation against another does not speak (i.e. substantiate his charge) in the court, he shall be punished with corporal punishment

(29) N. 15. Tit, 19.

(30) Vi. V, 74. (31) Y. II, 235 ; & N. 14 Tit., 20.

(in a complaint of grave offence—Kulluka) or with fine (in an accusation of lighter offence—Kulluka), and his case shall be dismissed if he does not argue within three fortnights. (32)

In Athens also a criminal prosecution could be instituted for false accusation or malicious prosecution (sycophantia) and the punishment was left to the discretion of the jury. (33) In mediæval France if a person brought a false complaint against another he was punished with banishment or fine ; while in mediæval and early modern England for indicting an innocent man of felony, falsely and maliciously, the punishment was imprisonment, fine and pillory. (34)

8. INTENTIONAL OMISSION TO APPREHEND AN OFFENDER ON THE PART OF A PUBLIC SERVANT.

As has been observed, if any member of the public omitted to apprehend a criminal he was liable to punishment. If this was a criminal offence on the part of the public, surely it was a more heinous offence on the part of the public servants who had been entrusted with the duty of apprehending malefactors. So Kautilya lays down, if the guards frighten robbers in order to give them a hint to run away, they shall be tortured to death. Again, in case a public servant or officer causes or helps a prisoner awaiting trial, to escape from the lock-up, he shall be punished with the middlemost amercement when the escape is made without breaking open the lock-up, and with death when breaking it open. (35) According to Yagnavalkya when

(32) M. VIII, 58.

(33) Demos. III, App. VIII, P. 345.

(34) Cont. Cr. L. P. I—Ch. VI—39f ; Black. IV—Ch. X—P. 136.

(35) Kau. II—Ch. V, 59 ; IV—Ch. IX, 223 & 224.

an officer releases a thief or an adulterer, or any undertrial prisoner, he shall be punished with the highest pecuniary penalty. (36) Agni and Matsya Puranas also prescribe the same punishment for an officer who wilfully suffers a thief to make good his escape. (37) It appears that while punishing the officer for his default no distinction was made between the various degrees of crime which the criminal was charged with, as was the case in England, where in case of voluntary escape with the consent and connivance of the officer, the officer was punishable similarly with the prisoner. (38) Further we are not told whether in ancient India the public officer was punished if an offender escaped through his negligence.

9. INTENTIONAL OMISSION ON THE PART OF THE PUBLIC SERVANT TO APPREHEND CONVICTS.

When a public servant (officer) suffered a convict to escape, he was dealt with more rigorously than if he allowed an undertrial prisoner to run away. According to Kautilya, if an officer suffers a prisoner to escape from the jail, he shall be put to death and his property shall be confiscated to the state. (39) It should be noted in this connection that in ancient India, persons awaiting trial and convicts were confined in different places, the former in the lock-up (charaka) and the latter in the jail (Bandhanagara). Kautilya does not make any distinction in awarding punishment on the public officer: he lays down the same punishment whether the convict is punished for a grave or lighter offence. But in later times this distinction is made. Agni Purana lays down that if a jailor or the person who has been entrusted with the duty

(36) Y. II, 295.

(37) Ag. P. CCXXVII, 58—66; M. P. CCXXVII, 202.

(38) Black.IV—Ch. X.—P. 129.

(39) Kau. IV—Ch. IX—224.

of punishing the offenders suffers a convicted criminal to escape, he shall be punished with the penalty to which the criminal has been sentenced. (40)

10. CAUSING THE RELEASE OF AN UNDERTRIAL PRISONER.

When a person causes the release of an undertrial prisoner, he shall be punished with the highest amercement. This is the recommendation of Kautilya and Yagnavalkya. (41)

11. RESCUING A PRISONER FROM THE JAIL.

If anyone rescues a man who has been convicted and put into the jail, he shall, according to Kautilya, be punished with death and confiscation of his entire property. (42) According to Yagnavalkya he who rescues a prisoner shall be impaled. (43) Matsya Purana prescribes double punishment (i.e. double the punishment of the convict) for the man who sets free a convict kept in confinement. (44)

12. DEFAMATION OF FAULTLESS WITNESSES IN COURT.

It was permitted by the Hindu law to expose the defects of a faulty witness by the opposite party. But at the same time improper and unfair attack on his character was not allowed. We learn from Brihaspati that if a litigant tried to cast a false blemish on a faultless witness

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(40) Ag. P. CCXXVII—58—66.
(41) Kau. III—ch XX—199 ; & Y. II, 243.
(42) Kau. IV—ch. IX—223. (43) Y. II, 273.
(44) M. P. CCXXVII, 210.

he was liable to pay a fine of the same amount as the value of property in dispute.(45) But nothing has been said about the amount of fine to be levied for defaming a faultless witness in criminal cases where no property was involved. Perhaps it was left to the discretion of the court. We shall appreciate this law if we consider how witnesses arenowadays harassed in our courts by lawyers. Under the protection of lawyer's privilege, a pleader not infrequently casts undue aspersions or insinuations on the character of thoroughly trustworthy and respectable witnesses.

13. TRANSGRESSION OF THE JUDGES AND ASSESSORS.

In the lawbooks of all peoples we find that condign punishments have been laid down for partial and corrupt judgment. That the Hindu lawgivers were particularly anxious to prevent miscarriage of justice by the corrupt judgment of unscrupulous and dishonest judges and assessors actuated by avarice, anger or other base motives is evident from the severe punishments they have prescribed for tainted judgement.

Manu prescribes a fine of 1000 panas for each of the judges who (wilfully) decide a case in the wrongway, and recommends the king to retry it himself. But for wrong judgment influenced by bribe the punishment is forfeiture of the entire property of the judge. (46) According to Vishnu "that detestable judge who dismisses a suit without punishment, such as deserves it shall incur twice as heavy a penalty as the criminal himself." But for the judge who is influenced by bribes he prescribes confiscation of the entire property. (47) Yaganvalkya also prescribes the same punishment if the judges or assessors

(45) Brih. VII. 24.

(46) M. IX, 234 & 231. (47) Vi. V, 195 & 180.

violate the law out of lust or fear. (48) Where the members of the court pass an unlawful sentence out of 'ignorance, wrath or covetousness' they shall be dismissed and punished by the King. That is the recommendation of Narada. (49) The dictum of Narada that judges are to be punished if they pass an unlawful sentence out of ignorance militates against our notions of justice. Perhaps what Narada wants to convey is that no one who is ignorant of the law should accept the post of a judge or assessor. And if any such man becomes judge out of covetousness he must suffer for his ignorance. Surely this punishment was not intended to meet the case of a bonafide mistake of the judge.

Brihaspati prescribes banishment for the judges who pass unjust sentence and accept bribe (50). Agni Purana also recommends banishment for corrupt judges, but it further adds confiscation of entire property. (51)

But Kautilya is superb when he enumerates the transgressions of the judges and lays down punishments. As it is very interesting, we quote the following from Dr. Shamashastry. [pp. 281 & 282].

"When a judge threatens (tarjayati), browbeats (bhartshayati), sends out (apasharayati), or unjustly sentences (abhigrashate) anyone of the disputants in his court, he shall be punished with the first amercement. If he defames or abuses (vakparushye) anyone of them, the punishment shall be doubled. If he does not ask what ought to be asked, or asks what ought not to be asked, or leaves out what he himself has asked (pristva ba vishrijati), or teaches (sikshayati), reminds (shmarayati), or provides anyone with previous statement (purvam dadati), he shall be punished with the middlemost amercement".

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(48) Y. II, 4, & 308.

(49) N. I, Legal Procedure, 66 & 67.

(50) Brih. XXII, 10. (51) Ag. P. CCXXVII, 46—50.

"When a judge does not inquire into necessary circumstances, inquires into unnecessary circumstances (deyam desam na pricchati, adeyam desam pricchati), and makes unnecessary delay in discharging his duty, postpones work with spite (chalena atiharati), causes parties to leave the court by tiring them with delay (kalaharanena shrantamapavahayati), evades or causes to evade statements that lead to the settlement of a cause (margapannam vakyamutkramayati), helps witnesses by giving them clues (matishahajyam shakshibhyo dadati), or resumes cases already settled or disposed of (taritanushishtam karyam punarapi grihnati), he shall be punished with the highest amercement. If he repeats the offence, he shall both be punished with double the above fine and dismissed".

"When a judge or commissioner imposes an unjust fine in gold, he shall be fined either double the amount of the fine, or 8 times that amount or imposition which is either more or less than the prescribed limit (Hinatiriktashtagunam ba)".

"When a judge or commissioner (pradesta) imposes an unjust corporal punishment, he shall himself be either condemned to the same punishment or made to pay twice the amount of ransom (nishkraya) leviable for that kind of injustice." (It appears that corporal punishments were sometimes commuted to money penalty of prescribed amount.)

"When a judge falsifies whatever is true amount (bhutamartham nasayati) or declares as true whatever amount is false (abhutamartham karoti), he shall be fined 8 times that amount."

What a modern spirit do the above lines breathe! These sentiments might as well have been expressed with

a few necessary changes by a modern jurist. That an Indian has taken so much pains to safeguard the life, liberty, and property of the people from the transgressions of the court about 2200 years ago is itself a great tribute to the sense of justice of the ancient Hindus. Though every state of the antiquity prescribed penalties for corrupt judges, nowhere, I believe, the law-givers enunciated in such clear and unambiguous terms the faults of the presiding judges of the courts and the punishments prescribed for the same.

Now let us turn to the laws of the other peoples on this subject.

In Babylonian law the punishment for giving wrong judgment was dismissal of the judge and a penalty of twelve times that had been awarded. (52) In Athens if anyone gave bribe to a judge or juror, or if a judge or juror received the bribe with a view to give corrupt judgment, he was 'punishable either with death, or a fine of ten times the value of the bribe, or a further penalty at the discretion of the jury.' (53) The 'Twelve Tables' prescribes death penalty for the corrupt judge or arbitrator. (54) In mediaeval France if a judge took bribe he was dismissed from his office; he had also to pay damages to the wronged party and a fine to the state. (55) In England in Blackstone's time the oppressive and partial judge was punished with dismissal, fine, imprisonment and discretionary censure. As for the jurors, the giver of bribes was fined and imprisoned, and the receiver was punished with 'perpetual infamy, imprisonment for a year, and forfeiture of tenfold value.' (56) It may be noted here that in ancient times jurors were punished for wrong verdict, whether or not they were influenced by bribes.

(52) Ham., 5. (53) Demos. III, App. VIII, P. 343.
(54) T. T. 9[3] (Nas.) (55) Cont. Cr. L. Part. I, Ch. VI—39f.
(56) Black. IV—Ch. X—Pp. 140, 141.

14. OFFENCES OF THE OFFICERS OF THE COURT.

Not the judges and assessors only but clerks and other officers of the court were also punished for wilfully perverting the course of justice. We learn from Kautilya, that when a clerk does not take down what has been said, writes what has not been said (uktam na likhati anuktam likhati), takes down after removing the defects what has been badly said (duruktamupalikhati), writes down in a perverted form what has been well said (suktamullikhati), makes a confusion of issue and proof (arthotpattim ba bikalpayati) he shall be punished with the first amercement or in proportion to his guilt. (57)

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(57) Kau.—Ganapal Sastri—P. 161 [The translation of Shama Sastri does not seem exact.]

CHAPTER III.

OFFENCES RELATING TO COINS.

The early law-givers do not say anything about counterfeiting coins. This is perhaps due to the fact that at their time there were no coins, or at least they were not popular media of exchange. It is clear that in Manu's time a regular system of metallic money was in use, and the days of barter had come to an end. Yet he too is silent on this point. It may be due to the fact that in his time coinage had not been introduced. By the time of Yagnavalkya and Kautilya, however, it had become the monopoly of the state. The state took great pains to maintain the purity and accuracy of coins. Not only was counterfeiting punished, but great care was taken so that even the goldsmiths engaged in the state mint did not falsify the standard weight and quality of the coins.

1. COUNTERFEITING COINS.

According to Kautilya whoever manufactures or counterfeits coins shall be banished ; but Yagnavalkya is more lenient and prescribes the highest amercement for this offence. (1)

In Athens debasing coinage was held to be a very grave crime and was punishable with death. But it appears that the state had not the monopoly of coinage and did not regard the manufacture of coins by private persons as a violation of the law. (2) Counterfeiting coins

(1) Kau. IV, Ch. IV—210; & Y. II, 240.

(2) Demos. III, App. VIII, Pp. 342—343.

was also a capital offence punishable with death in the Roman Empire. (3) In mediaeval France counterfeiters of coins were held guilty of 'lese majeste', and were punished with death or loss of eyes. They were often killed by being thrown into a boiling cauldron. (4) In England by 25 Ed. III. c. 2 counterfeiting kings' coins was made high treason. (5)

2. USING COUNTERFEIT COINS AS GENUINE.

Kautilya prescribes a fine of 1000 panas for causing counterfeit coins to be manufactured or using them (as genuine), but for paying such coins to the treasury he recommends capital punishment. (6) Yagnavalkya, however, lays down the highest amercement for using counterfeit coins as genuine. (7)

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(3) Ency. of Rel. & Eth. IV—Crime & Punishment (Roman).
(4) Cont. Cr. L. Part I—Ch. VI—39f.
(5) Black. IV—Ch. VI—P. 83.
(6) Kau. IV—Ch. I—201. (7) Y. II, 240

CHAPTER IV

OFFENCES RELATING TO WEIGHTS AND MEASURES.

In ancient India the state kept a strict control over weights and measures to protect the people from being cheated by dishonest merchants, vendors &c. It would appear from Vasistha, Manu, and Kautilya that weights and measures were properly marked or stamped by the officers of the state and at the end of every 6 months they were re-examined by them, so that there might be no diminution in them. The use of unstamped weights and measures was punished (with a fine of 27¼ panas according to Kautilya). (1)

1. FORGING OF FALSE WEIGHTS AND MEASURES.

Manu and Kautilya advise the king to supervise weights and measures so that no fraud be committed on the people by dishonest persons. Kautilya lays down proportionate fines rising from 3 panas upwards for possessing (and evidently for forging) false weights and measures. (2) For falsifying weights and measures Vishnu and Yagnavalkya propose the highest amercement. (3)

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(1) Vas. XIX. 13; M. VIII, 403; Kau. II—Ch. XIX—105; & Bk. IV—Ch. II—203.

(2) Kau. IV—Ch. II—203. (3) Vi. V, 122; & Y. II, 240.

2. USE OF FALSE WEIGHTS AND MEASURES.

For using false weights and measures Kautilya prescribes double the fines imposed on forgerer or possessor of false weights and measures. (4) According to Yagnavalkya the fine shall be 200 panas for defrauding $\frac{1}{8}$ th. part while weighing by a false weight or measure. If more or less be defrauded the fine also will proportionately vary. (5) Matsya Purana prescribes the highest amercement for using false weights. (6)

In mediaeval France if anyone used false weight or measure he was often punished with the loss of the thumb. (7)

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(4) Kau. IV—Ch. II—203.
(5) Y. II, 224. (6) M. P. CCXXVII, 199.
(7) Cont. Cr. L. Part I—Ch. VI—39f.

CHAPTER V

PUBLIC NUISANCE.

The study of ancient Hindu law, as has been said before, is essential for the proper understanding of Hindu civilisation. And it seems that Hindu legal genius manifested itself in the most pronounced way in the laws regarding public health, sanitation and convenience. That the Hindus were no mere dreamers or a race of philosophers or lotus-eaters, whose sole concern was for matters spiritual and life hereafter in total disregard of their material well-being, is conclusively proved by these laws. That the ideal of the Hindu state was not merely the maintenance of law and order or even peace and prosperity of the subjects but an allround development of Hindu character and genius and promotion of material and physical welfare of the people will be evident to even a casual reader of these laws. No other state in the ancient or mediaeval age can show such comprehensive series of laws which are best calculated to promote the happiness and general well-being of the people. There runs through all these laws a spirit which is so essentially modern that after one reads them one is tempted to ask the question, "Is it true? Can it be possible that a people who have won the unenviable reputation of being most unpractical and most indifferent to public health and sanitation could have formulated such splendid laws more than 2000 years ago?" Yet that is the fact.

1. NEGLIGENT ACT LIKELY TO SPREAD INFECTION OF DISEASE.

Kautilya lays down, "Whoever throws inside the city the carcass of animals such as a cat, a dog, a mongoose and a snake shall be fined 3 panas ; of animals such as an ass, a camel, a mule, and cattle shall be fined 6 panas ; and human corpse shall be punished with a fine of 50 panas." (1) The object of this law, evidently, is to prevent the outbreak of any epidemic through the putrefication of a dead body. So also we find in the ancient Persian law that if a man threw on the ground a bone of a dead dog or of a dead man and if grease or marrow flowed from it, he was to be punished with stripes ranging from 30 to 1000 with each kind of whips (they had two kinds of whips) according to the size of the bone. (2) Perhaps Kautilya has been actuated by the same motive when he prescribes the first amercement for taking out a dead body through a path or gate other than the prescribed one. (3) And that obiously is the reason for prohibiting the cremation or burial of a dead body, on pain of a fine of 12 panas, beyond the cremation or burial ground. (4) The Persian law lays down, "The worshippers of Mazda shall carry the dead to the highest summits where there are corpse eating dogs and birds. If they shall not fasten the corpse, so that the dogs and birds may carry the bones to water and to trees, they shall be Peshotanu and punished with 200 stripes" with each whip. (5) In Rome the 'Twelve Tables' declared it unlawful 'to burn or bury the dead within the city.' (6)

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(1) Kau. II—Ch. XXXIV—145. (2) Vendidad. Farg. VI—II 10 ff—Zeud-Avesta.

(3) Kau. II—Ch. XXXIV—145. (4) 1 bid. (5) Vend. Farg. VI—V—44—48.

(6) T. T. 10^{10} (Nas.)

2. ADULTERATION OF FOOD AND DRINK AND MEDICINAL DRUGS INTENDED FOR SALE.

For adultering unadulterated articles (adushitanam dravyanam dushane) Manu has prescribed the lowest amercement. (7) He does not specify the articles: they may mean food, drink, medicine and any article of use. Kautilya recommends a fine of 12 panas and Yagnavalkya that of 16 panas for adultering medicinal drugs, oily substances, salt, scent, grains etc. (8)

In England by 12 Car. II. c. 25[11] adulteration of wine was punished with a fine of £ 100, if done by a wholesale merchant, while the fine was £ 40 in the case of the vinter or retail trader. (9)

3. SALE OF NOXIOUS AND FORBIDDEN FOOD.

The sale of noxious or forbidden food was punishable, mainly for reasons of health. Vishnu prescribes the highest amercement for the sale of forbidden food and article. (10) According to Kautilya, he who sells human flesh shall be punished with death, and the penalty of selling rotten meat is either the mutilation of two legs and one hand or a fine of 900 panas. Moreover the flesh of animals which have been killed outside the slaughter house (Parisunam), headless, legless and boneless flesh (that is the meat of animals that have been killed in the forest by beasts of prey), badsmelling meat, and the flesh of animals that have died of itself (evidently due to disease) should not be sold. If any one violates this law he shall be punished with a fine of 12 panas. (11)

Vishnu has prescribed the mutilation of one hand and one foot for selling forbidden meat and Yagnavalkya

(7) M. IX, 286. (8) Kau. IV—Ch. II—204; & Y. II, 245.
(9) Black. IV—Ch. XIII—P. 162. (10) Vi. V, 174.
(11) Kau. II—Ch. XXVI—122; & IV—Ch. X—226.

recommends the mutilation of limbs and the highest amercement for that offence. (12) It is needless to observe that these laws were promulgated for the best interests of the people.

In England, we find that 51 Hen. III. st. 6, and the ordinance for bakers prohibit 'the sale of corrupted wine, contagious or unwholesome flesh, or flesh that is bought of a Jew, under pain of amercement for the first offence, pillory for the second, fine and amercement for the third, and abjuration of the town for the fourth.' (13)

4. THE SALE OF NOXIOUS AND UNWHOLESOME ARTICLES.

It is wellknown that nowadays clothes and articles belonging to the dead body, which are left in the cremation ground, are sold by the Doms to dishonest traders who in their turn sell them to the public (especially to the poor) at cheaper prices, thus spreading the germs of disease to many unsuspecting homes. Anyone who lives in a large city like Calcutta knows how this trade is briskly plied on the pavements of the streets and at some disreputable places. In fact this has become a great menace to the safety and health of the people and requires an urgent and prompt suppression. The ancient Hindus were not blind to this danger and framed laws for its suppression.

Kautilya prescribes mutilation of legs or a fine of 600 panas for selling articles lying on a dead body, but Yagvanalkya recommends the highest amercement only. That is also the punishment recommended in Matsya Purana. (14)

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(12) Vi. V, 49; & Y. II, 297. (13) Black. IV—Ch. XIII—P. 162.
(14) Kau. IV—Ch. X—225; Y. II, 303; M. P. CCXXVII, 204.

5. FOULING WATER OF PUBLIC SPRINGS AND RESERVOIRS.

The Hindus were equally alive to the fact that the water of tanks, springs and other places should not be allowed to be fouled by careless and nasty people in the interest of public health, for foulwater is responsible for many kinds of disease. So Vishnu recommends a fine of hundred panas and the removal of the nuisance for a person passing urine or excreta near a water-reservoir while Kautilya prescribes discretionary fines rising from 1 pana upwards for defiling water of tanks etc. by excreting faeces. (15) According to Katyayana he who defiles ponds or holy waters shall be fined 250 panas and shall be compelled to remove the filth. (16) But Sankha is very severe with this offence and prescribes death or mutilation for defiling tanks, ponds or other watering places. (17)

6. COMMITTING NUISANCE IN THE HIGHWAY OR IN A PUBLIC PLACE.

Not only was defiling water punishable, but committing nuisance on the road or in other public places was also punished with fines. So Manu lays down that if a person commits nuisance on the King's highroad except in a distressing circumstance, he shall be fined 2 panas, and shall be compelled to remove the excreta. But a distressed person, an old man, a pregnant woman, an infant shall not be fined but shall be reprimanded and be liable to remove the faeces. (18) According to Kautilya, for excreting faeces in places of pilgrimage, temples and royal buildings the fine shall be from 1 pana upwards according to the nature of the offence. For throwing dirt in the street frequented by carts the fine shall be one eighth of a pana, and for causing mire to be collected the

(15) Vi. V, 106 & 107; & Kau. II—Ch. XXXVI—145.
(16) Katyayana—Boundary Disputes—Vy. May; & Contest regarding boundaries—V. Cheir.
(17) Sankha—Robbery & other Violence—V. Cheir.
(18) M. IX, 282—283.

fine is one fourth of a pana. But double shall be the fine for committing such offences in the king's highway. (19) Vishnu prescribes a fine of 100 panas and the removal of the filth for committing nuisance in a garden or a highway. (20) For committing nuisance on the road Brihaspati recommends a fine of 1 masha and Agni and Matsya Puranas lay down a fine of 1 Karshapana and the removal of the excreta. Like Manu, Matsya Purana also exempts infants, old men, pregnant women, cripples from punishment and recommends rebuke for them. (21)

In England for common nuisance the offender was, according to Blackstone, indicted to amend the wrong and in some cases he was fined. (22)

7. OBSTRUCTION TO PUBLIC THOROUGHFARE.

Kautilya prescribes different fines for obstructing different kinds of roads. He does not, however, mention the nature of obstruction. (23) According to Narada roads must not be obstructed by terrace, pits, aqueduct, the edge of thatched roof, places for ordure &c.; violation of this law, due either to inadvertence or wilfulness, shall be punished with the highest amercement. (24) Brihaspati recommends a fine of 1 masha for causing obstruction to a thoroughfare by purposely crowding it with carts or the like, by planting trees, and digging pits and so on. (25)

8. CAUSING INJURY TO HUMAN LIFE OR BEAST ON A PUBLIC ROAD BY RASH DRIVING.

This section is interesting for more reasons than one. It indicates that society had advanced to a a high degree

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(19) Kau. II—Ch. XXXVI—145. (20) Vi. V, 106, 107.

(21) Brih. XIX, 28; Ag. P. CCXXVII, 51—57;& M. P. CCXXVII, 173 & 174.

(22) Black. IV—Ch. XIII—P. 167. (23) Kau. III—Ch. X—171.

(24) N. 11 Tit., 15 & 16. (25) Brih. XIX, 28.

of civilization. Trade had flourished, and it was found necessary to regulate wheeled traffic by enacting laws relating to roads. Further it makes it clear that the ancient Hindus realized the distinction between murder and culpable homicide as well as death caused by pure accident.

Manu is of opinion that except under ten circumstances over which no man has control, the cartman, or its owner, or passenger is liable to punishment in case any injury happens to any man or beast on the road. The following are the exceptions :—when the nose rope of the bullock is snapped, when the yoke breaks, when the carriage turns sideways or jolts backward and forward (due to the uneven nature of the ground), on the breaking of the wheel or axle, on the breaking of the straps, headrope or bridle, or when the driver has loudly warned the passerby to get out of the way. (26) If any accident happens by the cart turning off the road the owner of the cart shall be fined 200 panas if the driver be inefficient. But if the driver be efficient and the accident is due to his negligence he alone shall pay a fine of 200 panas, otherwise each of the passengers shall be punished with a fine of 100 panas. If inspite of obstruction on his way (carts, chariots, beasts &c.) the carter drives his cart and causes injury to any creature, he shall be punished without the least consideration. For thus killing any man he shall be summarily punished as a thief, i. e., with a fine of 1000 panas according to the commentators, (manushya marane kshiptam Caurabat kilvisham bhabet), while for killing other animals the fines shall be in proportion to the value of the animal killed. (27)

According to Kautilya when a passerby is killed by an elephant the driver shall pay the highest fine. Like Manu Kautilya also enumerates certain circumstances under which the accidental killing of a man or an animal by

(26) M. VIII, 290—292. (27) M. VIII, 293—298.

a cart is not punishable ; in other cases the driver shall be punished with fines for causing death to a man or animal ; and in the case of killing an animal, compensation should also be paid to its owner. If the driver be a mere boy (minor) the owner of the cart shall be punished. If the owner is not in the cart the passenger is to be punished; but the driver himself when he is not a minor. (28) Yagnavalkya also enumerates the circumstances under which the accidental killing of a man or an animal is not to be punished, but he does not specify any punishment to be inflicted otherwise. (29) Matsya Purana also expresses similar opinion as Manu's. (30)

9. NEGLIGENT CONDUCT IN RESPECT OF VICIOUS ANIMALS.

According to Kautilya and Yagnavalkya if the owner of a tusker or horned animal does not rescue a person who has been attacked by it, he shall be punished with the lowest amercement ; the punishment is doubled when he refrains from extending his help though piteously appealed to by the victim. (31) We are not told whether the owner was liable to punishment if the animal attacked a man in his absence (for his keeping a dangerous animal with the knowledge of its vicious character) or whether it was insisted that he should take special care to restrain his animals of vicious nature from injuring others. It would appear that the owner was not responsible in such a case, for Narada says, "the owner of a horse, dog or monkey is not responsible for any damage caused by any of these animals unless he should have set them to do it." (32)

In this respect the Babylonian law seems more reason-

(28) Kau. IV—Ch. XIII—233.
(29) Y. II, 298 & 299. (30) M. P, CCXXVII, 96 & 97.
(31) Kau. IV—Ch. XIII, 233; & Y. II, 300.
(32) N. 15 & 16 Tit. 32.

able. According to it if an ox, known to be vicious, be not bound, nor its horns blunted, the owner has to pay half a mina of silver if it gores and kills a freeman, and one third mina if a slave. There is no punishment if a mad bull does this in the highway. (33) But the Persian law on the point is extremely barbarous, for it lays down, "If there be a mad dog that bites without barking in the house of a worshipper of Mazda, he shall muzzle it. if he does not do so and the mad dog bites a sheep or wounds a man, *the dog shall pay for the wound as for wilful murder*—his left ear shall be cut off." If he repeats the offence his feet &c. will be mutilated. (34) Though the Mosaic law excuses the owner when he is ignorant of the vicious character of the ox, and holds him responsible only when he has knowledge of it, yet the laws relating to this subject are extremely primitive :—"If an ox gore a man or a woman, that they die : then the ox shall be stoned, and his flesh shall not be eaten, but the owner of the ox shall be quit." (35) To hold an animal responsible for any injury and to punish it for the offence betrays a lack of proper notions of justice. Then again, "But if the ox were wont to push with his horn in time past, and it hath been testified to his owner, and he hath not kept him in, but that he hath killed a man or a woman ; the ox shall be stoned, and his owner shall be put to death." (36) It is quite consonant with justice that in such a case the owner shall be held responsible, but the penalty of death is altogether out of proportion to the gravity of the offence. But it is positively revolting when we are told, "Whether he have gored a son, or have gored a daughter, according to this judgment shall it be done unto him". (37) Comment is unnecessary. The law of Solon prescribing the delivery of the dog to the injured, with a wooden collar fastened to its neck, in case it has bitten any body, is quite resonable—it is only a protective measure.

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(33) Ham., 250—252. (34) Vend. Farg. XIII—29—34.
(35) Exod. 20^{28} (36) Exod. 20^{29} (37) Exod. 20^{31}

We do not know what is meant when the Anglo-Saxon law prescribes, "If a beast injures a man, (its owner) must hand over the beast (to the injured man), or come to terms with him." (38) If the beast is delivered by way of compensation, it is quite reasonable. If, however, it is to be offered to the injured party, so that he may wreak his vengeance on the insensible creature, it can not be condemned too strongly.

We should not, however, forget that these were the laws of less advanced people. But it is really surprising that the mediaeval French law would exhibit such barbarity. There criminal prosecution against animals was a regular feature. (39)

10. NEGLIGENT CONDUCT WITH RESPECT TO DANGEROUS ARTICLES.

The laws discussed under this head do not deal with public nuisance : for the sake of convenience they are considered here.

For throwing harmful things that may give pain inside the house of another man Kautilya prescribes a fine of 12 panas, and Yagnavalkya 16 panas. For throwing such things as may destroy human life (Mitakshara explains as poisonous snakes &c.) Kautilya recommends the lowest amercement and Yagnavalkya the middlemost. (40) It appears that these punishments are prescribed for cases where actual harm has not been done.

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(38) Alfred, 24—The Laws of the Earliest English Kings—Allenborough.

(39) Cont. Cr. L. Part I—Ch. VI—39e.

(40) Kau. III—Ch. XIX—197; Y. II, 224.

CHAPTER VI

OFFENCES RELATING TO RELIGION.

The Hindu law relating to religious offences is on the whole characterised by a humanity and toleration found nowhere in the ancient and mediaeval world. While the laws of other peoples on this subject revel in blood, the Hindu law is, with a few exceptions, free from fanaticism and severity. Religious persecution was not a feature of Hindu India. While in most countries heresy and apostacy have been punished with extreme severity—nay sometimes with extreme barbarity—the Hindus have generally given religious reformers and preachers of new religions a free hand to propagate their faith, provided they did not make any direct attack on the Vedas. Not only was toleration showed to other religions, but some of their founders were even honoured—sometimes apotheosised. Thus Buddha, the arch enemy of Hinduism, was in later times, admitted into the Hindu pantheon. It is for this ideal of religious toleration that so many religious systems took their rise in India. Yet the Hindus were an extremely religious people. Their whole life was permeated with a religious ideal. That a people so thoroughly religious could take such a sane and tolerant attitude towards other religions is a unique phenomenon in the ancient world. Not only were they tolerant of other religions but their treatment of religious offences also was generally lenient. Most of the offences which have elsewhere been punished with the extreme penalty of the law, were comparatively leniently dealt with in this country.

There was, however, one great blot which cannot be overlooked. It is worthwhile to notice that inspite of this spirit of religious catholicism the Hindu law was rather severe on the Sudras. They were not allowed to read, or even listen to the recital of the Vedas. Violation of this rule was brutally punished. Without trying to justify this, some thing may be said in explanation. This disability of the Sudras was due to the fact that they were aliens whom the Aryans wanted to shut out from the participation of their religious ceremonies. In the early period of the Roman history, religion was a sealed book to the Plebeians and it was a monopoly of the Patricians. So if the Aryans refused to admit Sudras (non-Aryans) into the mysteries of their religion there is nothing strange in it. But the punishment was severe. The reason has been fully discussed in Book I, in connection with the influence of caste system on the Hindu law.

1. DESTRUCTION OF, OR INJURY TO, TEMPLES.

According to Manu he who destroys (bhedakan-binashakan Kulluka) a temple should be punished with death. Matsya Purana also recommends the same punishment. (1) But Katyayana provides a much lighter punishment for this offence, viz., a fine of 250 panas. (2)

2. THEFT OR DESTRUCTION OF IDOLS OF THE GODS.

A fine of 500 panas has been prescribed by Manu for the destruction of an idol (pratimananca bhedaka) while Vishnu prescribes the highest amercement for it. (3) Manu further insists that the broken idol shall be repaired and restored. Matsya Purana also is of the same opinion with Manu. (4) According to Katyayana, 'he who cuts,

(1) M. IX, 280; & M. P. CCXXVII, 172.

(2) Katyayana—Robbery & other Violence—V.Chin.

(3) M. IX, 285; Vi. V, 174. (4) M. P. CCXXVII, 176—179.

steals, or burns the images of the gods or destroys temple, shall be fined 250 panas.' (5) Sankha prescribes a fine of 800 panas as well as the repair of the idol, for breaking it. (6) Kautilya prescribes the alternative punishments of death (beheading) or highest fine for stealing the idol of a god.(7)

In ancient Athens these offences would fall under the heading 'Impiety'. The punishment was left to the discretion of the Jury. It might be either death, fine, or banishment. (8)

3. HERESY, APOSTACY AND ATHEISM.

A striking feature of the Hindu law is the almost complete absence of any law relating to heresy and heretics. There is only one law dealing with the heretics. Manu prescribes banishment for heretics (Pashandastham). (9) The later lawgivers are silent with regard to such an important subject. One is led to assume that they did not regard heresy as an offence. History also lends support to this view. Though there was rivalry between various sects and religions, in no period of Indian history do we hear of religious presecution. The kings might have favoured one particular religion or other : they did not, however, persecute other religions or creeds. Asoka, the greatest of the Budhist Emperors of India, who spent his whole life for the propagation of his religion, never showed the least sign of religious intolerance. His edicts enjoin the people to revere parents, Brahmanas and others ! The famous Chinese traveller Yuan Chwang bears testimony to the religious toleration of Harshavardhan. Hindu Emperors and kings also did not persecute the Budhists, Jainas and

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(5) Katyayana—Robbery & other Violence—V. Chin.

(6) Sankha—Robbery & other Violence—V. Chin.

(7) Kau. IV—Ch. X—226. (8) Demos. III—App. VIII, Pp. 346—348.

(9) M. IX, 225.

the Ajivikas. Everyone was granted the absolute freedom of conscience and worship. This is not a mere conjecture but fact. The foreign travellers never mention of religious persecution in India, nay they definitely say that religious toleration was the characteristic feature of India. Early Indian history does not record any religious war like the Thirty years' war, or a reign of terror as established in England under Henry VIII and Mary, and in Spain under Philip II.

This spirit of religious toleration will be better appreciated when we examine the laws of other peoples. In ancient Persia the punishment of heresy was death. We are told that Mani, the heretic was flayed alive. (10) For false prophets (heretics) winning over the Israelites from the true God, the punishment was death by stoning. (11) "He that sacrificeth unto any god, save unto the Lord only, shall be utterly destroyed." (12) In Athens 'the teaching of mischievous doctrines or false philosophy and the like' was regarded as 'impiety'. The punishment was left to the discretion of the jury—death, banishment, or fine. Anaxagorus was incarcerated for his theories regarding the sun, Protagorus was banished from Athens for expressing his doubts about the existence of the gods (We do not hear that Charvaka suffered any punishment for a similar offence in India), and the fate of Socrates is well-known. The charge against him was "that he did not believe in the gods of his country, that he introduced the worship of new divinities and that he corrupted youngmen." [Buddha and Mahavira were not harassed for their religious beliefs.] (13) Matters were not more encouraging in Imperial Rome, where bands of Christians were thrown to hungry lions in the circus and the spectacles were enjoyed

(10) Zoroastnian Civilisation—Ch. L.—Religious offences—Sassanian Period.
(11) Deu. 13^{1-10} ; Deu. 17^{2-5} .
(12) Exod. 22^{20} ; Ezek. $18^{12,13}$; II King $23^{20,24}$.
(13) Demos. III, App. VIII, P. 347 ; App. IV, P. 258.

by the Roman people. Even in the Republican period the state had the right to proceed criminally against any cult which it thought to be dangerous to morality. (14) The religious history of mediæval Europe is written in characters of blood. Worst crimes have been committed in the name of religion, that which is holiest, in the name of one who brought the message of love and charity ! Verily has it been said, "Christ was the only Christian and he died on the cross." In Spain the Inquisition was the monument of religious persecution. The 'Massacre of St. Bartholomew's Day' stands to the eternal disgrace of France. "Play the man, Master Ridley", still rings in our ears. What is the good of multiplying instances ? Suffice it to say that burning was the punishment for heresy in Spain and France. Apostates were burnt in Bracton's England. The statute, 'de haeretico comburdendo' of Henry IV's reign consigned the heretic to the flames : this was however abolished by 29 car. II. c. 9, as late as the 17th century. (15)

4. BLASPHEMY.

Blasphemy was a punishable offence in ancient India. Everyone has the right to hold any religious belief he likes, but has absolutely no right to wound the religious susceptibilities of others by aggressive propaganda or by abusing their religion and gods. So Kautilya prescribes the highest fine for defaming the gods and the temples. (16) Yagnavalkya and Matsya Purana are of the same opinion. (17) This penalty is very lenient when we take into consideration those of other countries. The Mosaic law lays down, "He that blasphemeth the name of the Lord, shall surely be put to death." (18) In Athens blasphemy against the gods was considered as 'impiety' and was

(14) Cont. Cr. L.—Part I—Ch. I, 16—Persecution of the Christians.

(15) Black. IV—Ch. IV—Pp. 42—49.

(16) Kau. III—Ch. XVIII, 194.

(17) Y. II, 211 ; & M. P. CCXXVII, 188. (18) Lev. 24^{16}

punishable with death, fine, or banishment according to the discretion of the jury. (19) Blasphemy was less severely punished in France than heresy. "He who has indecently blasphemed against God or the Virgin Mary is to be fined, put in the pillory for 3 days, with a placard on which his crime is named in large characters, so that everyone may know of it, and then he is banished from the country". (20) In England this offence was punished with fine and imprisonment or with other infamous corporal punishments. (21)

5. OFFENCES OF THE SUDRA RELATING TO RELIGIOUS INSTRUCTION.

Gautama lays down that if a Sudra intentionally listens to the recital of the Vedas, molten lead or shellac should be poured into his ears, and if he recites the Vedas his tongue shall be cut off. (22) Manu and Yagnavalkya are, however, silent on this point. Brihaspati lays down, '(A Sudra) teaching the precepts of religion, or uttering the words of the Vedas, shall be punished by cutting out his tongue.' (23)

6. DEFILING OTHERS BY GIVING PROHIBITED FOOD AND DRINK.

It was regarded as a criminal offence to defile others by giving interdicted food and drink. Naturally the highest fine was imposed for defiling a Brahmana, and the lowest for defiling a Sudra. Accordingly Kautilya prescribes the highest amercement for defiling a Brahmana, middlemost amercement for a Kshatriya, lowest amercement for a Vaisya, and a fine of 54 panas for a Sudra. (24) Yagna-

(19) Demos. III, App. VIII, PP. 346—348.
(20) Cont. Cr. L. Part I—Ch. VI—39f.
(21) Black. IV—Ch. IV—P. 59.
(22) G. XII, 4 & 5. (23) Brih. XX, 12.
(24) Kau. IV—Ch. XIII, 232.

valkya and Matsya Purana express the same opinion ; only they prescribe half of lowest amercement for the Sudra. (25) It would appear that in earlier times this offence was regarded with greater severity. For Vishnu prescribes a fine of 16 suvarnas for offering uneatable food to a Brahmana, a fine of 100 Suvarnas for offering him food which degrades him, and death for offering wine. Half of these punishments is prescribed for defiling a Kshatriya, half again of that for defiling a Vaisya, and the lowest amercement for defiling a Sudra. (26)

7. THE UNTOUCHABLE DEFILING THE HIGHER CASTES BY TOUCH.

According to Vishnu if a man belonging to an untouchable caste willingly defiles a member of the twiceborn caste by touching him, he shall be punished with death. (27) This is undoubtedly a great blot on the Hindu religion and law. Certainly, the high caste Hindus were at liberty to maintain the sanctity of their person from the touch of unclean people, but capital punishment for merely touching their person was most unjustifiable and inhuman. It appears that in course of time the brutality of the law was realised by the Hindus and the extreme penalty was abolished for this offence. So Kautilya and Yagnavalkya prescribe a fine of 100 panas only for touching an Aryan or a high caste man. (28)

8. SUDRAS WEARING THE INSIGNIA OF BRAHMANAS.

The Hindu society was frankly based upon caste-system and its ideal was that every caste should perform the duties assigned to it and live according to the precepts

(25) Y. II, 296; & M. P. CCXXVII, 203.
(26) Vi. V, 98—103. (27) Vi. V, 104.
(28) Kau. III—Ch. XX—199; & Y. II, 234.

laid down in the Sastras. If there were any violation of this principle, the society would be disorganised and religious confusion would arise. Moreover, the distinction between the fair-skinned highly cultured Aryans and dark-skinned less civilized non-Aryans, or between the conqueror and the conquered was real and marked. Time would have wiped out the distinction between the conqueror and the conquered. But the colour-bar formed a chinese wall between the Aryans and the non-Aryans. Even to-day inspite of all tall talks about equality and fraternity it forms a real barrier between the white and coloured peoples in many parts of the world. Thus U. S. A. and some other countries which have closed their doors to coloured peoples are pursuing the same policy in a round about way. Of course this is no defence of the ancient Hindus, but it explains their psychology when they tried to keep themselves distinct from the non-Aryan Sudras.

Manu lays down that if a Sudra wears the insignia of the Aryan and thus tries to pass as such he shall be corporally punished (ghatayet = capitally punished, according to Kulluka). (29) This law was of course too hard and brutal. The later lawgivers apparently felt it and were in favour of more lenient treatment. So Kautilya prescribes either the destruction of the eyes by poisonous ointment or a fine of 800 panas. (30) Yagnavalkya would not go even so far. He recommends a fine of 500 panas only. (31) So corporal punishment is definitely abandoned for this offence of the Sudras. Humanity is about to triumph over racial prejudice and arrogance.

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(29) M. IX, 224 & 260.

(30) Kau. IV—Ch. X—225. (31) Y. II, 304.

CHAPTER VII

WITCH-CRAFT AND SORCERY.

Like all ancient and mediæval peoples the Hindus also believed in witchcraft and sorcery. They believed that many strange things which were impossible for ordinary mortals to do in an ordinary way could be done with the help of witchcraft, magic and incantation. This is a superstition which dies hard ; even today it prevails among illiterate masses.

Though the ancient Indian was suspicious and mortally afraid of such a powerful and supernatural science which could work wonders, and could injure and destroy men and beasts, yet he never introduced wholesale massacre of witches and magicians as was the case in mediæval Europe. As long as they did not try to injure others, they were allowed to practise their art without let or hindrance. It is only when they used it for criminal or immoral ends that they were punished.

Generally they were not punished with death, though Kautilya is of opinion that in some grave and heinous cases they might be put to death. So while in most of the ancient and mediæval states witches were punished with a cruel death, in India the laws were much more lenient and humane. The Babylonian law prescribes death for 'a man who wrongfully casts a spell on another.' (1) In Mosaic law death by stoning is prescribed for a witch. (2) In Athens, "those impostors, who practised upon ignorant persons by jugglery or quackery, were liable to be treated as male-

(1) Ham., 2. (2) Exod. 22^{18} ; & Lev. 20^{27}

factors, and were punishable even with death, if the jury chose to inflict it." (3) The 'Twelve Tables' prescribes death for a person who practises enchantment or uses poisonous drugs; and 'the law of Cornelia de Sicaries inflicts capital punishment upon those who practise odious arts or sell pernicious medicaments, occasioning the death of mankind, as well as by magical incantation.' (4) In mediæval France those who practised witchcraft, sorcery, incantation &c., were exposed on the gibbet, branded with hot iron, and even were burned, according to the heinousness of the case. (5) In England both before and after the conquest witchcraft, conjuration, enchantment or sorcery was punishable with burning. By 33 Hen. VIII, c. 8, and 1 Jac.I. c.12 these offences were declared as felony without benefit of clergy. This was the law till the 9th year of George II's reign. (6)

According to Manu if a person attempt to kill another by incantation or practise magic rites with roots on persons not related to him, he shall be punished with a fine of 200 panas. (7) Kautilya recommends either 'lex talionis' or the middlemost amercement for attempting to injure others. (8) It seems that the first penalty is to be applied when the attempt is successful, otherwise the fine. But he definitely says, "witchcraft merely to arouse love in an indifferent wife, in a maiden by her lover, or in a wife by her husband is no offence." According to Brihaspati if a person 'procure gain by spells or medicine', he shall be compelled to disgorge it (no punishment is mentioned !), if he practise incantations with roots, he shall be banished. (9) Matsya Purana is practically of the same opinion with Manu. (10)

(3) Demos. III, App. VIII, P. 350. (4) T. T. 8^{21}; Just. Bk. IV—Tit. XVIII, 5. (5) Cont. Cr. L. Part. I—Ch. VI, 39f.

(6) Black. IV—Ch. IV—Pp. 60—61.

(7) M. IX, 290 ;—Kulluka explains that this punishment is to be inflicted when death has not resulted, otherwise the punishment of murder shall be inflicted.

(8) Kau. IV—Ch. XIII—233.

(9) Brih. XXII, 16. (10) M. P. CCXXVII, 183.

CHAPTER VIII

OFFENCES AGAINST MORALITY AND FAMILY LIFE.

1. INCEST.

Sexual intercourse with a near relative and with others in special relationship was considered a heinous crime or sin (mahapataka) by the ancient Hindus. That was also the case with the Hebrews and the Babylonians. It may be regarded as an offence against morality.

Baudhayana prescribes branding and banishment for a Brahmana violating the Guru's (spiritual preceptor) bed. The defiler of Guru's bed (Gurutalpaga) has been called a great sinner (mahapatakin) by Manu. (1) If such a man fails to perform the suitable penance, he shall be punished with fines, banishment and corporal punishment. The mark of a female organ should be branded on the forehead of the defiler. Further he shall be socially ostracised. But if such a man performs suitable penance, he shall not be branded; he shall be punished, with the highest amercement only. (2) In the case of a Brahmana committing such an offence wilfully, he shall be banished, if accidentally he is to pay the middlemost amercement. In the case of members of other castes the punishment is banishment and forfeiture respectively. (3)

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(1) Ban. I, 10, 18. (2) M. IX, 235—240.
(3) M. IX, 241—242.

Vishnu is more severe with the mahapatakins. He prescribes capital punishment for all except the Brahmanas, for whom he recommends banishment and branding. (4) For incestuous offence Kautilya lays down death preceded by mutilation of the organ. The woman also should suffer death if she yields of her own accord. (5) According to Yagnavalkya, a man who holds sexual intercourse with his daughter, father's sister, mother's sister, maternal uncle's wife, daughter-in-law, step-mother, sister, preceptor's daughter and preceptor's wife, is said to be a 'Gurutalpaga'. For this offence he prescribes the same punishment as Kautilya, whose enumeration is almost identical with that of his. (6)

Narada extends the denotation of the term 'Gurutalpaga' by adding several other females to the list, but he reduces the punishment to cutting off of the organ only. (7) In Matsya Purana the punishment becomes much more humane. It recommends only a fine of double the amount as in the case of adultery. (8)

The Babylonian law punished incest with death or banishment. Hammurabi prescribes banishment for a man who knows his daughter, death by drowning for him who knows his daughter-in-law, and by burning for him who holds incest with his mother. In the last case the mother also is to share the same fate. (9) In the Mosaic law death has been prescribed for both the parties. Sexual intercourse with the following is held to be incest :— Father's wife, daughter-in-law, mother-in-law, sister, step-sister, half-sister, mother's sister, father's sister, uncle's wife and brother's wife. (10)

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(4) Vi. V, 1—3 & 7. (5) Kau. IV—Ch. XIII, 234.
(6) Y. II, 232 & 233.
(7) N. 12 Tit., 73—75. (8) M. P. CCXXVII., 139—140.
(9) Ham., 154, 155 & 157.
(10) Lev. 18^{6-17} ; $20^{11,12,14,17,20}$

In 1650 incest was made a capital offence in England. But at the Restoration this law was not confirmed and the offence was left to 'the feeble coercion of the spiritual court.' (11)

2. DRINKING.

Though drinking of *soma* juice in religious ceremonies was permitted in ancient India, drinking of spirituous liquor on ordinary occasions was regarded as a heinous sin by the Hindu lawgivers. (12)

The punishments which are recommended by Manu and Vishnu for 'Mahapatakin' have been mentioned in connection with 'incest'. So they need not be repeated here.

3. FOMENTING LITIGATION BETWEEN FATHER AND SON.

In the interest of domestic peace and tranquillity fomenting quarrels and litigation between father and son was made a punishable offence in ancient India. So Vishnu has prescribed a fine of 10 panas for giving evidence in a dispute between father and son, while for those who create and foster such quarrels from behind, the highest fine has been recommended. (13)

Yagnavalkya has laid down 3 panas as the fine for giving evidence in quarrels between father and son, and 24 panas for standing surety to either of them. (14) In Matsya Purana also fines have been laid down for giving evidence in a dispute between father and son. (15)

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(11) Black. IV—Ch. IV—P. 65.

(12) Bau. I, 18, 18; Vas. I, 20; M. IX, 235; Vi. V, 1—5; Y. III, 227 &c. &c.

(13) Vi. V, 120 & 121. (14) Y. II, 239.

(15) M. P. CCXXVII, 198—199.

4. DESERTION.

Desertion of father, son, sister, brother, husband, wife, preceptor, and disciple without any just and reasonable cause (such as guilty of a crime entailing loss of caste) has been viewed as a punishable offence by the Hindu law-givers.

Manu has prescribed a fine of 600 panas for this offence, Kautilya recommends the first amercement, and Vishnu and Yagnavalkya 100 panas only. Sankha prescribes a fine of 200 panas. In Matsya Purana the fine is 600 gold pieces. (16)

Narada would severely punish the husband who deserts an obedient and virtuous wife and this seems to be the opinion of Vishnu also, who likens him to a thief. (17)

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(16) M. VIII, 389 ; Kau. III—Ch. XX, 199 ; Vi. V, 113 ; Y. II, 237 ; Sankha—Robbery & other Violence—V. Chin. ; & M. P. CCXXVII, 147.

(17) N. 12 Tit., 95 ; Vi. V, 163.

CHAPTER IX.

OFFENCES AFFECTING HUMAN BODY.

1. OFFENCES AFFECTING LIFE.

(i) Homicide.

The Mosaic law divides homicide into two classes, wilful and accidental. Wilful homicide (i.e. murder) should be punished with death. But for accidental homicide the slayer is not to be killed : he is to "flee to a city of refuge", where he is to "remain till the death of the high priest" when he may come back to his native place. Should the slayer, however, return before such time he might be killed as in cases of wilful homicide. (1)

In Athens there were five tribunals for the trial of homicide. The first tribunal — the court of Areopagus— tried cases of murder and poisoning. If the accused was convicted, he was punished with death. But it should be noted that even after the commencement of the trial the accused was permitted to withdraw from his country to a voluntary exile and no one could prevent him except in the case of parricide. But in that case he was condemned to perpetual exile and his property was confiscated". The second tribunal, the court of Palladium, tried cases of involuntary homicide. "If the accused be convicted and found to have done 'the deed' he shall leave the country on certain day, and must remain in exile until he has made his peace with the relatives of the deceased" (by money payment). The third court was that of Delphinium. It tried cases of justifiable homicide (e.g. killing in self-

(1) Exod.21 12—14 ; Numbers 35 11, 12, 22—28 ; Lev. 24 17, 21 ; Deu. 19 2—6, 11—13 ; Ezek. 18 10, 13 ; Josh. 20 2—9.

defence). There was no punishment in this case. The other two courts have no importance for us. We may ignore them. (2)

In mediæval French law no distinction was drawn between murder and involuntary homicide, but it distinguished killing in public from that in secret, and the latter was considered more heinous. During the later middle ages, however, a clearer notion of the crime gradually developed. At first they used the term 'guet apens' which indicates 'killing with premeditation, rather than secret homicide.' But still there was some confusion. Then they went one step further and defined homicide ('meurtre') as the act of killing one's fellowmen in ambush ('guet apens') i.e. with premeditation.' According to Bouteiller homicide by carelessness ought not to be punished, but even in that case the accused would be capitally punished unless the prince pardoned his offence. Poisoning was considered to be a more heinous crime. Like Roman 'parricide' the murder of husband by wife or father by son, and son by father was considered most heinous and was punished by throwing the culprit into the river. (3) But in course of the sixteenth century homicide came to be divided into four groups : (a) justifiable homicide, (b) accidental homicide, (c) homicide by negligence and (d) murder.

In England by the time of Blackstone homicide came to be divided into three kinds : (a) justifiable, (b) excusable and (c) felonious. Homicides committed for the prevention of forcible and atrocious crimes, such as murder, robbery, arson, house breaking at night, as also that committed by a woman to save herself from being ravished by a man, were considered justifiable. There was no punishment for this. Even a father or a husband was immune if he killed one who attempted to outrage his

(2) Demos. III, App. VIII, Pp. 327—236 ; Orations against Aristocrates, Pp. 189—192.

(3) Cont. Cr. L. Part I, Ch. VI, 39f.

daughter or wife. Excusable homicide was subdivided into two classes, viz., 'by misadventure', and 'upon a principle of selfpreservation'. Formerly there was some punishment for such cases of homicide, but in Blackstone's time the offender got a pardon as a matter of course and right. Felonious homicide was of two sorts, viz., manslaughter and murder. 'Man-slaughter is the unlawful killing of another without malice express or implied.' The punishment is that of felony, but within the benefit of clergy. 'The offender shall be burnt in hand, and forfeit all his goods and chattels.' Deliberate and wilful homicide i.e. murder is punished with death. (4)

Now the question is whether such distinctions were made in the case of homicide in ancient India. The answer must be in the affirmative. The right of private defence was recognised in this country. In certain circumstances a man could kill another without incurring the liability of punishment. This may be called 'justifiable homicide.'

According to Baudhayana, "He who slays an assassin, able to teach (the Vedas) and born in a noble family, does not (incur) by that (act the guilt of) the murderer of a learned Brahmana; (in) that (case) fury recoils upon fury." (5) Vasistha also holds the same view: "He, who slays an assassin (atatayin) well-read in the Veda and born of a good family, is not guilty of the murder of a learned Brahmana ; (in) that (case) fury recoils upon fury." (6) Manu and other lawgivers are equally emphatic on this point. "One may slay without hesitation an assassin who approaches (with murderous intent), whether (he be one's) teacher, a child or an aged man, or a Brahmana deeply versed in the Vedas. By killing an assassin the slayer incurs no guilt, whether (he does it) publicly or secretly ; in that case fury recoils on fury." This is the opinion of

(4) Black. IV—Ch. XIV—Pp. 177—203.
(5) Bau. I, 10, 18.
(6) Vas. III, 15, 17, 18.

Manu. (7) Vishnu also holds the same view. (8) So also do Brihaspati, Katyayana and Matsya Purana. (9)

Now who are the assassins (atatayins) ? These are, according to Vasista, an incendiary, a poisoner, one who raises an weapon to kill, one who commits robbery, or one who occupies another's land with force, and an adulterer. (10) According to Vishnu they are such as try to kill with a weapon, a poisoner, an incendiary, one who imprecates a curse, one who tries to kill by reciting an incantation from the Atharva Veda, one who makes a false accusation to the king, and an adulterer; so also a slanderer, a robber, and a mischief-maker (11) Some of the persons specified by Vishnu are vague. Moreover it is difficult to believe that one who makes a false accusation to the king or a slanderer could be killed in self-defence.

Again there are some cases of homicide in which the offender is not punished at all, not because he is justified in doing so, but because it is due to an accident over which he has no control and there is no default on his part. It may be called involuntary or excusable homicide. We have seen that under certain circumstances the driver, owner and the passenger of a cart are not held responsible for the accidental killing of a man. (12) Further, according to Yagnavalkya a man is not punishable for causing death of another by throwing a piece of wood, stone &c., or by shooting an arrow, or by the movement of the hand or by any carriage or any animal, when he has given sufficient warning by shouting to withdraw from the place. (13)

Lastly we come to culpable homicide. It may be mentioned here that most probably in those ancient times

(7) M. VIII, 350, 351.
(8) Vi. V, 189, 190. (9) Brih, II, 15 & 16 ; Katyayana—Heinous Offence Vya. May ; & M. P. CCXXVII, 117.
(10) Vas. III, 16. (11) Vi. V, 191 & 192.
(12) M. VIII, 290—292 ; Kau. IV—Ch. XIII—233 ; & Y. II, 299.
(13) Y. II, 298.

it was not possible to draw such fine distinctions as between murder and culpable homicide not amounting to murder i.e. 'man-slaughter' of the English law. We do not know whether any man who killed another under grave provocation or who exceeded the limit of his right of private defence was punished at all, and if so for what offence. Yet this much is known that if due to the negligence or the incompetence of the driver (and not due to an accident) any human being was killed, the driver, or the owner, or the passenger was to be punished — and punished not with the punishment for murder but with that of theft. (14)

For murdering a Brahmana Baudhayana prescribes branding and banishment for the Brahman offender, while for others he recommends death and the confiscation of whole property. But if the non-Brahmana kills men of equal or lower caste the punishment will be according to the ability of the offender. (15) Nothing is said about a Brahmana slaying a non-Brahmana or a non-Brahmana slaying another non-Brahmana of higher caste. Apastamba lays down capital punishment and forfeiture for a Sudra committing murder; and as regards Brahmana, he says that he shall be made blind (by tying a piece of cloth over his eyes). He is silent as regards others. (16)

Manu is very severe with men who commit violence (sahasikam naram). He urges the king not to spare such men. For, "He who commits violence must be regarded as the worst offender (more wicked) than a defamer, than a thief, and than he who injures (another) with a staff". "The king who pardons the perpetrator of violence quickly perishes and incurs hatred." So on no account should the king let go the perpetrator of violence, who is a terror to all—nay not even for friendship or wealth. (17) Now, we are told by Narada that violence or (sahasa) includes

(14) M. VIII, 293—298; Kau. IV—Ch. XIV, 233.

(15) Bau. I—10—8—(18—20.)

(16) Ap. II—10—27—16. (17) M. VIII, 344—347.

homicide, robbery, rape, and 'two species of insult'. (18) In another sloka Manu says, "Those who slay women, infants or Brahmanas ... ... the king shall put to death." (19) Here women, infants or Brahmanas have been specifically mentioned. Is it to be inferred that for murdering grown up men, who are not Brahmanas, capital punishment should not be inflicted ? This view in not reasonable. Most probably the three classes have been specifically mentioned only to express abhorrence for their murder. Moreover, the Hindu lawgivers are never exhaustive in their enumeration. Vishnu clears all doubt. He says that the king should put to death those who kill women, children, or men. (20)

Kautilya is equally convincing. He prescribes death penalty for a man who kills another with a weapon. So also those who kill men or women with violence (prashabham) shall be impaled. Again, when a man intentionally kills (jadricchaghate) another he shall be simply put to death without any torture. (21) But a man who poisons another (Vishdayakam purusham) shall be drowned. So also a woman who murders a man. If she be pregnant, she should be drowned one month after her confinement. A woman who murders her husband, preceptor, offspring or poisons a man, shall be torn off by bulls. (22) This punishment is inhuman. It is to be noted here that poisoning has been distinguished from simple or ordinary murder. That was also the case in Athens. In mediæval France also poisoning was considered to be a more heinous crime. In England by 22 Hen. III. c.9 poisoning was made a treason (repealed by 1 Edw. VI. C. 12). So also in mediæval France the murder of the husband or son was considered a most heinous offence and was punished with drowning. In mediæval England the murder of the husband

(18) N. 14 Tit. 1 & 2. (19) M. IX, 232.

(20) Vi. V, 1—4 & 9—11.

(21) Kau. IV—Ch. XI—226, 227. (22) Kau. IV—Ch. XI—228.

was considered to be petit treason, the offender being dragged to the scaffold and burnt.

Kautilya also prescribes burning to death for any person who murders his father, mother, son, brother, teacher or an ascetic. (23) This reminds us of the punishment of parricide in ancient Rome.

The punishments prescribed by Yagnavalkya are similar to those of Kautilya. Thus for killing with violence impaling has been recommended and drowning for a woman murdering a man. If she kills her preceptor, husband, or offspring, she shall be torn to pieces by a bull after her ears, nose, &c., have been cut off. (24)

According to Narada, if a man kills another by administering poison, or with a weapon or in anyway, he is guilty of the sahasa of the highest degree as in the cases of rape and other offences affecting life. "For sahasa of the highest degree, a fine amounting to no less than a thousand (panas) is ordained. (Moreover) corporal punishment (Vadha), confiscation of entire property, banishment from the town and branding as well as amputation of that limb (with which the crime has been committed), is declared to be the punishment for sahasa of the highest order."

Brihaspati is most uncompromising. He recommends that murderers 'shall not be amerced in a fine, they shall be put to death by all means' by various modes of execution and their property shall be confiscated. (26) But when several persons beat a man and kill him, death penalty shall be inflicted on him 'who strikes the fatal blow.' The aiders and abettors 'shall be punished half as much.' (27)

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(23) Kau. IV—Ch. XI—227. (24) Y. II, 273, 278, 279.
(25) N. 14 Tit.,6, 8 & 9. (26) Brih. XXII, 29, 30 & 38.
(27) Brih. XXII, 31—33.

Katyayana also prescribes the capital punishment for murder. (28) Vyasa says that the murderer shall be tortured to death. (29)

It should be noted that corporal punishment (including death) is meant for non-Brahmanas only. The Brahmanas shall never be put to death. They are to be punished with banishment, branding, forfeiture &c.

The punishments for murder in Mosaic, Athenian, mediæval French, and English laws have been already discussed. Those of other countries will be examined now. In the ancient Persian law death is the punishment for murder. (30) In the Babylonian law impaling has been prescribed for a wife murdering her husband.(31) Nothing has been said as regards other cases of murder. The 'Twelve Tables' prescribes capital punishment for this offence. So also does the 'Cornelia de Sicareis'. But it should be noted that in the Republican period death penalty was hardly inflicted. "The custom was early established whereby the culprit, before the final verdict was given, could shake the dust of his country from off his feet and go into exile whereupon the assembly passed a resolution known as 'interdicto aqua et igni', refusing the offender the right to receive the chief necessaries of life—shelter, water and fire within the Roman territory." The punishment of parricide should also be noted in this connection. The head of the culprit was muffled in a wolf-skin, his feet were thrust in wooden shoes, and he was sewed up in a sack with noxious animals (a cock, an ape, an a serpent). Then he was drawn by black oxen and was hurled into

(28) Katyayana—Robbery & other Violence—V. Chin.

(29) Vyasa—Inquiry after murderers—V. Chin.

(30) Zoroastrian Civilisation—Ch. L—Criminal offences & their Punishments.

(31) Ham., 153.

(32) T. T. 8^{24}; Just. IV—Tit. XVIII, 5; Encyclopedia of Religion & Ethics—Vol. IV—Crime and Punishment (Roman).

the sea, so that his end could be as horrible as possible. (33)

(ii) CAUSING MISCARRIAGE AND INJURIES TO UNBORN CHILDREN.

Causing miscarriage or abortion was regarded as a serious offence by the ancient Hindus and was severely punished. Manu does not specify any punishment for this offence. But Kautilya prescribes the three amercements, the highest for causing abortion by striking (praharena); the middlemost for abortion through medicine (bhaishajyena), and the lowest for causing abortion by annoyances and hardships (parikleshena). (34) Even for causing miscarriage to a female slave by medicine the first amercement has been laid down. (35) Yagnavalkya prescribes the highest amercement for causing abortion. But in the case of female servants the punishment is a fine of 100 panas. (36) Narada has prescribed banishment for the women who procure abortion. (37) The recommendations of Usanas are quite similar to those of Kautilya. (38) For causing abortion a fine of 100 karshapanas has been prescribed in the Matsya Purana. (39)

In the Babylonian law compensation has been laid down for causing miscarriage to a free woman by striking, but in case the woman dies the daughter of the culprit is to be slain. This is simply revolting. Compensation only has been prescribed in cases of plebeian women and female slaves. (40)

Causing abortion was regarded as murder by the Persian law. If a man and a woman arranged to procure

(33) Problems of Roman Criminal Law—Ch. I, P. 21.
(34) Kau. IV—Ch. XI—227.
(35) Kau. III—Ch. XX—199.
(36) Y. II, 277, 236. (37) N. 12 Tit., 92.
(38) Usanas—Robbery & other Violence—V. Chin.
(39) M. P. CCXXVII, 196.
(40) Ham., 214.

abortion through drugs with the help of an old woman (like witches) in order to hide their shame all three were guilty of murder. (41)

According to the Mosaic law, "If men strive, and hurt a woman with child, so that her fruit depart from her, and yet no mischief follow, he shall surely be punished according as the woman's husband will lay upon him ; and he shall pay as the judges determine. And if any mischief follow, then thou shalt give life for life." (42)

In mediæval France if a man struck a pregnant woman he was condemned to death, and there can be little doubt that the same punishment would follow if the infant died in the womb which was called "encis." This was a special protection accorded to the unborn child. This protection, however, was accorded only as against a third party, and not as against its parents. Generally for the first offence no criminal penalty was imposed on the woman even for infanticide, but for the second offence the mother was burnt alive. (43)

In the Early English law, causing abortion was regarded as murder, but in Blackstone's time it was merely misprision. (44)

(iii) DEATH AND INJURY DUE TO THE NEGLIGENCE OR INCOMPETENCE OF THE PHYSICIAN.

The Hindu lawgivers have laid down punishments for cases where due to the negligence or incompetence of the physician the disease is aggravated, or the patient dies.

Manu prescribes the middlemost amercement for wrongly treating a patient. ['Narada adds, "But this

(41) Zend.—Vendidad—Farg. XV—IIa, 9—12; & 11 b, 13—16.

(42) Exod. $20^{22,23}$

(43) Cont. Cr. L.—Part I—Ch. VI—39f.

(44) Black. IV—Ch. XIV—P. 198.

refers to the cases where death is not (the result of the wrong treatment); for if that is the case the punishment is greater.'—Buhler.] It should be noted here that he recommends the lowest fine for wrongly treating animals. (45) Vishnu prescribes for this offence highest, middlemost and lowest amercements—the highest for a patient of high rank e.g., king's officers, middlemost for others, while lowest for animals. (46) Kautilya lays down the middlemost amercement for death due to the carelessness of the physician. He further adds, "Growth of disease due to negligence or indifference of a physician shall be regarded as assault or violence." (47) The recommendations of Yagnavalkya are quite similar to those of Vishnu. (48) According to Brihaspati, "A physician who, though unacquainted with drugs and spells, or ignorant of the nature of the disease, yet takes money from the sick, shall be punished like a thief". (49) It is not clear whether the punishment is for cheating or for the aggravation of the disease. According to Matsya Purana if a physician intentionally wrongly treats a patient, he shall be punished with the highest amercement. "Those whose treatment is blameable should be fined middlemost amercement, and the false ones should be fined lowest amercement". (50)

In the Babylonian law mutilation of hands was prescribed for the doctor when as a result of operation the patient died, or lost his eyesight. If the patient was a slave or an animal he had to pay compensation to the owner. (51) In the Persian law the unsuccessful operation was regarded as murder. (52) According to Blackstone, "If a

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(45) M. IX, 284. (46) Vi. V, 175—177.
(47) Kau. IV,—Ch. I—202.
(48) Y. II, 242.
(49) Brih. XXII, 8. (50) M. P. CCXXVII, 175.
(51) Ham., 218—220, 225. (52) Zend.—Vend. Farg. VII—VIIa—36—40.

physician or surgeon gives his patient a potion or plaster to cure him, which, contrary to expectation, kills him, this is neither murder nor man-slaughter, but misadventure; and he shall not be punished criminally, however liable he might formerly have been to a civil action for neglect or ignorance: but it hath been holden, that if he be not a regular physician or surgeon, who administers the medicine or performs the operation, it is man-slaughter at least." (53)

2. CAUSING HURT, CRIMINAL FORCE, & ASSAULT (DANDAPARUSHYA).

While in most countries, ancient, mediæval, or modern the aggrieved party has been given an option to elect between civil and criminal remedies for assault and battery, in ancient India a criminal action alone was maintainable. The injured party could not sue the offender for compensation or damages, though in some serious cases the court allowed him the cost of medical treatment. (54)

What the ancient Hindus called 'Dandaparushya' now a days comprises assault, hurt, and criminal force (assault and battery). For the sake of convenience we propose to follow the modern classification.

A. HURT.

The Hindu lawgivers are very severe with the Sudras. Gautama, Manu and Vishnu prescribe the mutilation of that limb of the Sudras (antyajah) with which they hurt the twice-born men. (55) Here the distinction is drawn between the Aryans and the non-Aryans, or between the high caste and the low caste. Kautilya is no less severe, but by his time there has been a change. The position of the Sudras

(53) Black. IV—Ch. XIV—P. 197.

(54) M. VIII, 287; Kau. III—Ch. XIX—195; Vi. V, 75; Y. II, 222; & Brih. XXI, 10.

(55) G. XII, 1; M. VIII, 279; Vi. V, 19.

has been a little improved, or rather that of the non-Brahmana Aryans lowered. Whereas in former times the Sudras had to suffer the loss of the offending limb for hurting any of the three high castes, now that punishment is prescribed for hurting the Brahmanas only. (56) No longer there is the question between the Aryans and the non-Aryans but between the highest and the lowest caste. It is one step in the advance of the Brahmanas to the predominant position by gradually lowering the position of other castes. In the next stage we find the supremacy of of the Brahmanas on the non-Brahmanas fully assured. In respect of the Brahmanas the non-Brahmana Aryans have practically sunk to the level of the Sudras. For Yagnavalkya prescribes the amputation of the offending limb not only of the Sudras but also of all the non-Brahmanas giving pain to the Brahmanas. (Viprapidakaram chedyamangama-brahmanashyatu). (57) But Narada again prescribes the loss of the offending limb for men of low caste (Sudras) hurting the Brahmanas. (58) And according to Agnipurana 'a kshatriya assulting a Brahmana shall be punished with a fine of 100 panas, a Vaisya 200 panas, while a Sudra shall expiate the guilt by his life.' (59) Matsya Purana repeats the recommendation of Manu. (60)

According to Manu, Narada, and Matsya Purana if anyone breaks the skin or causes blood to come out he shall be punished with a fine of 100 panas, but Brihaspati recommends the lowest amercement; if he pierces flesh he shall be fined 6 Nishkas, but according to Brihaspati he shall be punished with the middlemost amercement. For breaking bone they prescribe banishment but Brihaspati is satisfied with the highest amercement only. (61)

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(56) Kau. III—Ch. XIX—195.

(57) Y. II, 215. (58) N. 15 & 16 Tit., 25.

(59) Ag. P. CCXXVII, 23—31. (60) M. P. CCXXVII, 83.

(61) M. VIII, 284; N. 15 & 16 Tit., 29; M. P. CCXXVII, 87; & Brih. XXI, 8.

Vishnu, Kautilya, Yagnavalkya and Brihaspati distinguish simple hurt into two classes in as much as blood comes out or not. For the second case Vishnu prescribes a fine of 32 panas, Kautilya 24 panas, Yagnavalkya 22 panas and Brihaspati 2 Mashas. For the first case the fine should be double. (62)

For breaking hands, or legs, or teeth, or cutting off of the ear or the nose, Kautilya prescribes the lowest amercement, but Vishnu, Yagnavalkya, Brihaspati and Katyayana prescribe the middlemost amercement. The last two also recommend the highest amercement for entirely cutting them off. (63)

For wounding an eye or breaking the neck, or an arm, or the shoulder, Vishnu prescribes the highest amercement while Kautilya and Yagnavalkya recommend the middlemost amercement. (64)

For 'rendering a man unable to move about, or to eat or to speak,' Vishnu Kautilya and Yagnavalkya recommend the middlemost amercement. (65)

For beating a man severely, Kautilya prescribes the lowest amercement, but Vishnu and Yagnavalkya middlemost one. (66)

For destroying both the eyes, Vishnu prescribes either imprisonment (with fetters on) for life or 'lex talion'; Kautilya either 'lex talion' or a fine of 800 panas. But Yagnavalkya lays down only a fine of 800 panas. (67)

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(62) Vi. V, 66, 67; Kau. III—Ch. XIX—195; Y. II, 218; & Brih. XXI, 7.

(63) Kau. III—Ch. XIX—195; Vi. V, 68; Y. II, 219; Brih. XXI, 9; Katyayana—Assault—Vy. May.

(64) Vi. V, 70; Kau. III—Ch. XIX—196; Y. II, 220.

(65) Vi. V, 69; Kau. III—Ch. XIX—196; Y. II, 220.

(66) Kau. III—Ch. XIX—196; Vi. V, 69; Y. II, 219.

(67) Vi. V, 71, 72; Kau. IV—Ch. X, 225; Y. II, 304.

If one man is struck by many the penalty, according to Vishnu, Kautilya and Yagnavalkya, should be double for each of them. (68)

According to Brihaspati if a person, having been struck, beats the offender, he is not guilty. (69) Here the ground of exoneration is sufficient provocation or right of self defence But if in a quarrel 'two persons, strike simultaneously, the punishment shall be equal for both,' but if one of them makes the first attack or if one of them is a habitual offender, he must pay a larger fine. (70)

According to Narada and Brihaspati if a man of high caste beats a man of low caste (such as Chandala, Meda, &c.) being offended by harsh words or insults, he is not punishable. Nay in such cases Narada encourages him to take the law in his own hand. (71)

Now as to the laws of other countries.

According to the Babylonian law for striking a man greatly above him, the offender was to be whipped (60 lashes). A freeman striking a freeman or a plebeian striking a plebeian had to pay a fine of 1 mina and 10 shekels of silver respectively. If a slave struck a freeman his ear was cut off. If a man destroyed the eyes, or teeth or broke the bone of a freeman, his eyes or teeth or bone were destroyed or broken. But if the injured party was a plebeian or a slave he had to pay a fine only. For striking a man in a quarrel, the offender had to pay the doctor's bill, and in case of death compensation. (72)

According to the Persian law if a man struck another he was punished with 15 stripes with each kind of whip. If he was severely hurt the punishment was 30 stripes with

(68) Vi. V, 73 ; Kau. III—Ch. XIX—196 ; Y. II, 221.
(69) Brih. XXI, 4. (70) Brih. XXI, 13.
(71) N. 15 & 16 Tit., 11 & 12 ; & Brih. XXI, 14.
(72) Ham., 196—208.

each whip. If blood came out as a result of the striking 50 stripes with each whip were to be inflicted, while in the case of breaking of bones the punishment was to be increased to 70 stripes with each whip. If the injured man died the punishment was 90 stripes with each whip. For refusal to atone for the offence the offender was punished with 200 stripes with each whip. (73)

In the Mosaic law 'lex talion' or the eye for an eye, a tooth for a tooth, a hand for a hand, a foot for a foot, a wound for a wound and a stripe for a stripe has been prescribed. (74) But in case of a quarrel no punishment was to be inflicted ; only some compesaton was to be paid. (75)

In the Athenian law there were both civil and criminal actions for assault and battery and the party who had received the blows had the option to elect between the two. In the civil action for damage the gist of offence was the beating ; in the criminal one it was the indiguity. The punishment was left to the discretion of the jury—it might be fine or imprisonment. (76)

The 'Twelve Tables' prescribes retaliation for the fracture of bone or tooth, unless compensation was paid. In later times in every case of 'injuria' the injured person could elect between civil action and criminal prosecution ; but generally the civil action for damages was preferred. (77)

In mediæval France batteries and wounds were sometimes classified into three kinds, punishable according to

(73) Zend.—Vend.—Farg. IV—IIIa, 17, 26—42.

(74) Exod. $20^{24,25}$; Lev. $24^{19,20}$

(75) Exod. $20^{18,19}$

(76) Demos. III—Oration against Midias—P. 81 ; & App. VIII, P. 351.

(77) T. T. 8^{2-4} ; Just. IV—Tit. IV—'De Injuries'.

gravity. Blows and wounds were distinguished in as much as they caused blood to come out or not, in the former case the punishment was a fine of 60 sous, in the latter 5 sous. In cases of grievous hurt death penalty or some other discretionary punishment was imposed. 'Lex talionis' was sometimes followed in such cases. (78)

By the ancient law of England mayhem or 'cutting off or disabling or weakening a man's hand or finger, or striking out his eye or foretooth' was punishable with retaliation. Gradually this punishment went out of use and fine and imprisonment were imposed in such cases. By 22 & 23 Car. II. c. I. cutting off or disabling the tongue, nose, lip or eye or any limb of a man, 'with intent to maim or disfigure him' was made a felony without the benefit of clergy (as such punishable with death). Ordinary cases of battery and wounding were punishable, in Blackstone's time, with fines and imprisonment, even with corporal punishments in aggravated cases. (79)

B. CRIMINAL FORCE AND CONTUMACIOUS TREATMENT.

For insolently spitting or voiding urine or breaking wind on the person of a high caste man, Manu, Vishnu, Narada and Matsya Purana have prescribed the amputation of the offending organ of low caste men (Sudras according to Kulluka). (80) These punishments are no doubt brutal. Kautilya and Yagnavalkya are much more lenient and reasonable. They prescribe a small fine for voiding urine, faeces, saliva &c. on the body of a same caste man. If this offence is committed on a woman or persons of superior caste

(78) Cont. Cr. L. Part I—Ch. VI—39f.

(79) Black. IV—Ch. XV—Pp. 205—207, 216.

(80) M. VIII, 282 ; Vi. V, 21 & 22 ; N. 15 & 16 Tit., 27 ; & M. P. CCXXVII, 84.

the fine shall be doubled, if on persons of lower caste it shall be halved. (81)

For throwing mud, ash, dirt &c., on the body similar fines have been prescribed by Kautilya and Yagnavalkya, while Brihaspati recommends the lowest amercement. (82)

For pulling a superior by the hair, beard, feet, neck, or scrotum, Manu, Narada and Matsya Purana have prescribed the amputation of the hand of a low caste man. Vishnu, Kautilya and Yagnavalkya are much more lenient. They prescribe small fines for these offences. (83)

C. ASSAULT.

According to Manu if a low caste man raises his hand or a stick against any member of the three high castes his hand shall be cut off. (84) Kautilya recommends the amputation of a hand or foot or in the alternative a fine of 700 panas for raising a hand or foot against a higher caste or a teacher. (85)

Vishnu, Yagnavalkya and Brihaspati have prescribed a fine of 10 and 20 panas for raising a hand or foot respectively. For raising a piece of wood first amercement, for raising a stone second amercement, and for raising a weapon highest amercement have been laid down by Vishnu. Yagnavalkya prescribes the lowest amercement for a non-Brahmana raising a weapon or the like against a Brahmana, half of that for merely touching it. For raising weapons against each other both Yagnavalkya and Brihaspati prescribe the middlemost amercement. (86)

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(81) Kau. III—Ch. XIX—195 ; Y. II, 213 & 214.

(82) Kau. III—Ch. XIX—195 ; Y. II, 213 & 214 ; Brih. XXI, 5.

(83) M. VIII, 283 ; N. 15 & 16 Tit., 28 ; M. P. CCXXVII, 86 ; Vi. V, 65 ; Kau. III—Ch. XIX—195 ; & Y. II, 217.

(84) M. VIII, 280.

(85) Kau. IV—Ch. X, 225.

(86) Vi. V, 60—64 ; Y. II, 215 & 216 ; & Brih. XXI, 6.

In the ancient Persian law assault was called Agrepta and was punishable with 5 stripes with each whip ; the number increased on repetition. For the refusal to atone, the punishment was 200 stripes with each. (87)

In England the punishment for assault was fine and imprisonment in the time of Blackstone. (88)

3. WRONGFUL RESTRAINT AND WRONGFUL CONFINEMENT.

Both Kautilya and Yagnavalkya prescribe the highest amercement for keeping or causing to keep anyone in illegal confinement or restraint. (89) Although Narada does not specify any punishment for wrongful arrest he asserts that the offender should be punished. (90) According to Brihaspati and Katyayana, when a creditor wrongfully arrests or imprisons a debtor claiming adjudication he shall be punished with a fine equal to the claim. (91)

In England according to 43 Eliz. c. 13 if anyone imprisoned another by force within the four northern countries, he was guilty of felony without the benefit of the clergy. But in ordinary cases the punishment was fine and imprisonment. (92)

4. KIDNAPPING AND ABDUCTION.

The Hindu lawgivers regarded kidnapping and abduction as a kind of theft and prescribed suitable punishments for them.

For abducting men of good family and especially

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(87) Zend.—Vend. Farg. IV—IIIa,—17—21.

(88) Black. IV—Ch. XV—P. 216.

(89) Kau. III—Ch. XVII—192 ; Ch. XX—199 ; Y. II, 243.

(90) FN. 1, Legal Procedure, 51.

(91) Brih. & Katyayana—Recovery of Debt—Vy. May.

(92) Black. IV—Ch. XV—P. 218.

women (purushanam kulinanam narinamca bisheshatah) Manu lays down corporal punishment or death (Vadha), and punishment for theft for abducting slaves. (93)

Kautilya prescribes the alternative punishments of death without torture or highest amercement for abducting men and women. He prescribes the cutting off of the left hand and two legs, or a fine of 900 panas for kidnapping a girl or a female slave with gold ornaments on their person. (94)

According to Yagnavalkya the lowest amercement should be imposed for kidnapping a girl of the same caste; but for stealing a girl with ornaments on, he recommends the highest amercement; while for kidnapping a girl of the higher caste corporal punishment has been prescribed. For kidnapping a girl of inferior caste he recommends the lowest amercement. (95)

Narada prescribes the highest amercement for abducting men, forfeiture of entire wealth for abducting women, and corporal punishment for kidnapping girls. (96)

For the abduction of men and women Brihaspati recommends burning to death. (97) Vyasa prescribes mutilation of hands and feet for this offence. (98) Agni Purana lays down capital punishment. (99) The same punishment has been prescribed by Matsya Purana for abducting women of a higher class. (100)

While Manu has prescribed the punishment for theft for abducting a slave girl, Kautilya lays down the alterna-

(93) M. VIII, 323 & 342.
(94) Kau. IV—Ch. X—226.
(95) Y. II, 287, 288.
(96) N. N. M., 28. (97) Brih. XXII, 18.
(98) Vyasa—Punishment of unknown thieves—V. Chin.
(99) Ag. P. CCXXVII, 32—38. (100) M. P. CCXXVII, 101—105.

tive punishments of mutilation and a fine of 900 panas for stealing a slave girl with gold ornaments on. But in other cases he recommends either the mutilation of legs or a fine of 600 panas. (101) Narada recommends the mutilation of legs for the abduction of female slaves. (102)

In Babylonian, Mosaic, and Athenian laws kidnapping or abduction was punished with capital punishment. (103) In the Roman Empire kidnappers were sometimes punished with death and sometimes with a milder punishment. (104) In mediæval France he who abducted girls was capitally punished, for the offence was regarded as treason. But the offender could escape punishment by marrying his victim. (105) In England by 3 Hen. VII. c. 2, the forcible abduction of a heiress and afterwards her marriage with the stealer or a third person or the violation of her chastity was made a felony ; and by 39 Eliz. c. 9 the benefit of clergy was taken away from it. Kidnapping or the forcible abduction of a man, woman or child was punishable at Common law with fine, imprisonment and pillory. (106)

5. RAPE.

In India sexual offences (strisangraha), whether against married or unmarried women or against mature or immature girls, with or without consent, were with a few exceptions, punishable by law. Those with married women were generally more severely dealt with than those with maidens. But the most important factor dividing sexual offences was consent. If a man held any intercourse with a woman with force or fraud (i.e. without her consent)

(101) Kau. IV—Ch. X—225. (102) N. N. M., 33.

(103) Ham., 14 ; Exod. 21^{16} ; Deu. 24^{7} ; Demos. III, P. 154—Note 3 ; Ency. of Religion & Ethics. Vol. IV—Crime & Punishment.

(104) Just. IV—Tit. XVIII, 10.

(105) Cont. Cr. L. Part I—Ch. VI—39f.

(106) Black. IV—Ch. XV—Pp. 208, 209 & 219.

it was regarded as a more serious offence. Consent extenuated the guilt to a great extent, though not wholly. For, sexual offences were regarded not only as offences against person but also against morality and matrimonial rights. Naturally, they were divided into two classes, rape (sahasa) and adultery (strisangraha), though the term 'strisangraha' was generally used to denote both the classes.

In this section we propose to deal with rape.

According to Manu if a man violate an unwilling maiden he shall be punished with corporal punishment.(107) For defiling a maiden of the same caste, who has not reached her puberty, Kautilya prescribes the alternative punishments of cutting off of the hand or a fine of 400 panas ; but capital punishment in case the girl dies in consequence. For defiling an unwilling maiden, who has reached puberty, the cutting off of the middle finger or a fine of 200 panas has been recommended. The offender shall also pay compensation to her father. If a woman abet or help a man to violate a maiden against her will, she will be punished with a fine of 100 panas. Moreover, she will have to pay sulka (nuptial fee to the girl). (108) According to Yagnavalkya if a man ravish a maiden of inferior caste, his hand shall be cut off and in the case of a maiden of a higher caste, he shall be punished with capital punishment. (109) According to Narada when a man violates a maiden (of inferior or same caste) against her will two of his fingers shall be cut off, but if the maiden belongs to a higher caste he shall be punished with death and confiscation of entire property. (110)

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(107) M. VIII, 364.

(108) Kau. IV—Ch. XII—228—230. (109) Y. II, 288.

(110) N. 12 Tit., 71.

Now as to rape on married women.

According to Manu those who commit rape on the wives of others, should be 'marked by punishments which cause terror' and then be banished. This punishment, evidently, is for men of twice-born castes and not for the Sudras who are to be capitally punished even for adultery with protected women of twice-born castes. (111) But if a Brahmana commits rape on a guarded Brahmana woman he shall be punished with a fine of thousand panas. (112)

According to Narada rape or indecent assault on another man's wife is sahasa of the highest degree. For this kind of offence he prescribes the highest amercement, 'corporal punishment (including death), confiscation of the entire property, banishment from the town and branding, as well as amputation of that limb (with which the crime has been committed)'. This punishment is to be inflicted indiscriminately without any regard for the caste, except in the case of a Brahmana, who should not be subjected to corporal punishment. (113)

Brihaspati lays down, "(The king) shall confiscate the whole wealth of him who violates an unwilling woman, and having caused his penis and scrotum to be cut off, shall cause him to be paraded on an ass. When a man enjoys a woman by fraud, his punishment shall be confiscation of his entire wealth, and he shall afterwards be branded with the mark of a female part and banished from the town." (114)

Both Katyayana and Matsya Purana lay down capital punishment for rape. (115)

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(111) M. VIII, 352& 374. (112) M. VIII, 378.

(113) N. 14 Tit., 6—10.

(114) Brih. XXIII, 10, 11 & 12.

(115) Katyayana—A Heinous offence—Vy. May.; & M. P. CCXXVII, 127.

Prostitutes are placed on a different footing by Kautilya. For rape on a prostitute or on a girl (minor) of a prostitute against her will, he prescribes the highest amercement. But when he knows a minor girl of a prostitute with her consent the first amercement shall be imposed. (116) So it is clear that though consent of a minor girl extenuates the guilt to some extent it does not completely absolve the guilt. It appears that this punishment is recommended for prostitutes attached to the court. For rape on ordinary prostitutes he prescribes a fine of 12 panas only. (117)

Even rape on slave girls or female servants was punishable in ancient India. A man who ravishes a nurse or a pledged female slave (dhatrimahitikam) against her will shall, according to Kautilya, be punished with the first amercement; a third person committing this outrage shall be punished with the middlemost amercement. So also he who commits or helps another to commit rape on a pledged female slave or her daughter, shall forfeit the purchase money, shall pay a sum of money as compensation to her, and double the amount as fine to the state. (118) According to Yagnavalkya if a man commits rape on his female slave he shall be fined 10 panas; if many persons commit rape on such a woman, each of them shall be fined 24 panas. (119)

Rape has been considered a heinous offence in every country. In the Babylonian law the punishment for rape on another man's wife (residing in the house of her father) was death. (120) In the Mosaic law capital punishment was prescribed for committing rape on a betrothed damsel.

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(116) Kau. II—XXVII—124 (117) Kau. IV—Ch. XIII—234.

(118) Kau. III—Ch. XIII—182. (119) Y. II, 291.

(120) Ham., 130.

But if the damsel was not betrothed, the ravisher had to pay 50 shekels of silver to her father and to take her to wife. (121) In ancient Athens a man who committed rape might be punished with death, if it pleased the jury. (122) In Rome also capital punishment was prescribed for rape on 'a virgin, a widow, a nun ; or upon any other person'. (123) That was also the punishment in mediæval France. But in case a rape was followed by marriage, no punishment was inflicted. (124) In England according to Saxon law rape was punished with death. Later on William the conqueror substituted castration or loss of eyes for the extreme penalty. But if the woman accepted him as her husband the punishment was discharged. By 18 Eliz. c. 7 rape became a felony without clergy. By that law even 'carnally knowing and abusing any woman child under ten years was made felony without clergy—it did not matter whether with or without her consent. (125)

(6) ADULTERY.

Adultery should be regarded as an offence against morality and family life or rather against matrimonial rights. But for the sake of convenience it is dealt with here.

The Hindu law-givers have devoted greatest attention to adultery (strisangraha). The laws dealing with this offence are quite numerous. Punishments prescribed are also of different kinds. Their conception of adultery is quite different from modern ideas. Many acts which are

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(121) Deu. 22^{25-29}

(122) Demos. III—Oration against Midias—P. 73, Note 2.

(123) Just. IV—Ch. XVIII, 8.

(124) Cont. Cr. L.—Part I—Ch. VI—39f.

(125) Black. IV—Ch. XV—Pp. 210—213.

now-a-days regarded as quite innocent were held to be adulterous by the ancient lawgivers.

As regards the nature and amount of punishment to be inflicted in individual cases caste system played an important part. Naturally the punishment for adultery committed with a woman of superior caste was much more severe than that with a woman of lower caste, or of the same caste. The position of the Brahmanas was most advantageous, and that of the Sudras hardest.

According to Manu conversing in secret with another man's wife by a man notorious for previous act of adultery is to be held as adultery, punishable with the lowest amercement ; but a man of good character is not guilty if he converses with her for just reason. So also conversing with another man's wife in a lonely forest, at a 'tirtha' (a place on the river bank from where the women of the village fetch water), outside the village, at the confluence of rivers, is adultery (punishable with highest amercement according to Kulluka). Sending presents of scents and garlands, cutting jokes or embracing another man's wife or touching her ornaments, catching hold of her cloth, or lying down on the same bed and eating from the same dish are also to be viewed as adultery. If a man touches the private parts of a woman and if a woman does the same with a man without the latter's protest, these would constitute adultery by mutual consent. If one converses with another man's wife, inspite of warning, he shall unished with a fine of one suvarna. (126)

According to Kautilya if a man and a woman make signs to each other with a view to sexual enjoyment, or carry on secret conversation (for the same purpose), the woman shall pay a fine of 24 panas and the man double

(126) M. VIII, 354—358, 361.

the amount. For holding conversation in suspicious places whips may be substituted for fines. A woman holding out her hair, the tie of her dress round her loins, and showing her teeth or nails, shall pay the first amercement. (127)

According to Yagnavalkya, holding the hair of another man's wife or her cloth or her covering for breast, touching her hip or thigh, or conversing with her in an untimely hour at an improper place, are adulterous acts ; so also if there be any mark of embrace either on the person of the man or woman it is adultery. (128)

The recommendations of Narada are practically same as those of Manu. (129)

Brihaspati classifies adultery (strisangraha) into three groups, viz., sexual intercourse with force, with fraud, and with mutual desire. The first two divisions have been treated under rape. As regards the third class, adultery proper, he again divides it into three degrees —first, second and the highest. "Winking (at a woman), smiling (at her), sending her messengers, and touching her ornaments or clothes, is termed an adulterous act of the first (or lowest) degree. Sending perfumes, garlands, fruit, spirituous liquor, food, or clothes, and conversing with her in secret, is considered an adulterous act of the second degree. Sitting on the same bed, dallying, and kissing or embracing each other, is defined as an adulterous act of the highest degree by persons acquainted with law. For these three gradations of adultery, the first, middling, and highest fines shall be inflicted respectively ; the fine shall be even higher than that, in case of a very rich man." (130)

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(127) Kau. III—Ch. III—155.
(128) Y. II, 283 & 284. (129) N. 12 Tit., 62—69.
(130) Brih. XXIII, 1—9.

Vyasa also classifies adultery into three divisions. His classification is similar to that of Brihaspati. (131)

So it is seen from the foregoing enumerations that many acts which are quite innocent, at least not punishable by modern law, have been declared as adulterous by the Hindu lawgivers. But it should be noted that they do not carry the same punishment.

More severe punishments have been recommended for what is nowadays meant by adultery.

Baudhayana prescribes capital punishment for such offences committed by anyone other than a Brahmana. An exception has been made in the case of intercourse with the wives of minstrels or actresses. (132)

Apastamba prescribes the excision of the organ for intercourse with a married woman, but confiscation of property and banishment when with a marriageable girl. If a member of the three higher castes commits the same offence with a Sudra woman, he shall be banished, while a Sudra doing so with a woman of the higher castes, shall be capitally punished. (133)

For intercourse with a woman of superior caste, Vasistha prescribes capital punishment. He is silent as regards others. (134)

With Manu there is a little difficulty. In one place he prescribes capital punishment for a non-Brahmana guilty of adultery. (135) But when he lays down detailed rules he prescribes heavy fines or imprisonment. Accord-

(131) Vyasa—Adultery—V. Chin.

(132) Bau. II, 2, 4, 1 & 3.

(133) Ap. II, 10, 26, 18—21 ; 10, 27, 8—10.

(134) Vas. XXI, 1—5. (135) M. VIII, 359.

ing to Kulluka and others the first law is meant for Sudras committing adultery with a Brahmana woman. The fine is higher when committed with a woman of higher caste and less when with that of a lower. Moreover women are divided into two classes — protected and unprotected (gupta and agupta). In the former case the fine is higher than in the latter. (136) For adultery with a protected woman of a twice-born caste, a Sudra shall be punished with death and forfeiture of his property ; in the case of an unprotected woman he shall be punished with mutilation and forfeiture. Capital punishment has also been laid down for low caste men for the same offence. (137)

Kautilya lays down heavy fines for adultery with an unguarded Brahmana woman. But the Sudra is to be capitally punished for the offence. (138)

For adultery with the wife of a man of the same caste Vishnu, Yagnavalkya, Narada and Brihaspati prescribe the highest fine. The middling fine shall be imposed for intercourse with a woman of a lower caste. And death shall be inflicted for the offence with a woman of a higher caste. (139)

Although intercourse is allowed with a prostitute or a female slave not restrained by her master or with a wanton woman not belonging to the Brahmana, a fine is to be imposed when such a woman is the mistress of another man. (140) For adultery with a nun a small fine has been prescribed by the lawgivers. (141)

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(136) M. VIII, 375—385. (137) M. VIII, 374 & 366.

(138) Kau. IV—Ch. XIII—235.

(139) Vi. V, 40, 41, 43 ; Y. II, 286 & 289 ; N. 12 Tit., 70 ; & Brih. XXIII, 12.

(140) M. VIII, 363 ; Kau. III—Ch. XX—198 ; Y. II, 290 ; N. 12 Tit., 78 & 79.

(141) M. VIII, 363 ; Kau. IV—Ch. XIII—235 ; Y. II, 293.

For intercourse with a woman of a degraded caste (such as Chandala), Yagnavalkya prescribes branding and banishment, while Kautilya lays down branding and degradation of caste. Both of them prescribe death for a low-caste man who is guilty of such an offence with a woman of a higher caste. (142)

Manu is very severe with women. According to him, if a woman commits transgressions against her husband, she shall be devoured by ferocious dogs. (143) Kautilya and Yagnavalkya, however, lay down that such a woman shall have her ears and nose cut off. The former also prescribes the alternative punishment of middlemost amercement. Vishnu, Brihaspati and Katyayana take their cue from Manu and prescribe death penalty. (144)

Kautilya and Narada enumerate some exceptional cases in which adultery with other peoples' wives is not punishable. (145)

According to Manu there is no punishment (except the payment of nuptial fee if the father demands it) for adultery with an amorous maid of one's own caste. So also in the opinion of Kautilya it is no offence for a man of equal caste and rank to have connexion with a maiden who has been unmarried three years after her puberty. It is no offence for a man of different caste to have connexion with a maiden who has spent more than three years after her first menses and has no jewellery on her person. According to Narada when a man has connexion with a willing maiden, he is not guilty of any offence ; but he

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(142) Kau. IV—Ch. XIII—235 ; Y. II, 294.

(143) M. VIII, 371.

(144) Kau. IV—Ch. X—225 ; Y. II, 286 ; Vi. V., 18 ; Brih. XXII, 15 & 16 ; Katyayana—Heinous offences—Vy. May.

(145) Kau. IV—Ch. XIII—231 ; N. 12 Tit., 61.

must marry her after giving proper dowry. (146)

The laws relating to adultery are quite numerous and sometimes contradictory and confusing. The more important of them have been discussed here. Now we shall examine the laws of other peoples.

According to Babylonian law, 'if the wife of a man is found lying with another male, they shall be bound and thrown into water ; unless the husband lets his wife live, and the king lets his servant live'. But in case a man is taken captive and there is no food in the house, the wife may enter the house of another man without making herself liable to punishment. (147) According to Persian law a man who committed adultery with the wife of a nobleman was banished, and the woman had her nose and ears cut off. (148) For adultery with another man's wife the Hebrew law prescribes capital punishment for both the parties. The same punishment has been prescribed for adultery with a virgin betrothed to another man. But in the case of adultery 'with a woman, that is a bond maid, betrothed to a husband, and not at all redeemed, nor freedom given her', they shall not be capitally punished, but the woman shall be scourged. (149)

In the Athenian law adultery was regarded as a serious offence and was severely dealt with ; but the punishment was left to the discretion of the jury. Moreover, a man could lawfully kill on the spot 'one whom he caught in adultery with his wife, daughter or sister, mother and even with his concubine'. (150) In Rome, at

(146) M. VIII, 364 & 366; Kau. IV—Ch. XII—229; N. 12 Tit., 72.

(147) Ham., 129, 133 & 134.

(148) Zoroastrian Civilisation Ch. L—Moral wrongs.

(149) Ezek. $18^{11,13}$; Deu. 22^{22-24} ; Lev. 20^{10} ; Lev. 19^{20}

(150) Demos. III—Oration against Aristocrates—P. 184 ; & App. VIII—Pp. 348—349.

first adultery was not regarded as a criminal offence. But by 'lex Julia' it was made criminal, the offender being liable to capital punishment in the case of violation of marriage bed. (151)

In mediæval France sexual intercourse with consent with a maiden was not regarded as a crime. The punishment of violating the marriage bed (i.e. adultery in the modern sense) differed greatly according to locality. Generally it was very lenient — a small fine and some ignominous punishment. But the husband had the right to kill his wife if caught in the act. (152)

In England, in early times an adulterer had to pay compensation to the husband of the woman. If caught red handed the husband or any near relative could lawfully kill him. Since the Restoration the courts do not punish adultery as an offence. It is regarded as a private injury. (153)

7. UNNATURAL OFFENCE.

For unnatural offence with a man or a woman the lowest amercement has been prescribed by Kautilya, while Yagnavalkya recommends a fine of 24 panas only. (154) Narada prescribes a fine of eight times the fee for unnatural offence with a prostitute. (155)

Vishnu prescribes a fine of 100 karshapanas for intercourse with any beast, but in the case of a cow the second amercement is recommended. That is also the opinion of

(151) Just. IV, Title XVIII, 4.
(152) Cont. Cr. L. P. I—Ch. VI—39f.
(153) Black. IV—P. 64.
(154) Kau. IV—Ch. XIII—234 ; & Y. II, 293.
(155) N. 6 Tit., 19.

Yagnavalkya and Narada. But Kautilya prescribes a fine of 12 panas only for bestiality. (156)

Matsya Purana lays down shaving of head for intercourse with a donkey, but a fine of one gold piece for that with a cow. (157)

In ancient Persian law the unnatural offence was regarded as a heinous sin. "If a man voluntarily commits the unnatural sin, for that deed there is nothing that can pay, nothing that can atone, nothing that cleanse from it—if he be a professor of the religion of Mazda, or one who has been taught in it. But if not, then his sin is taken from him, if he makes confession of the Religion of Mazda and resolves never to commit again such forbidden acts." (158) According to Mosaic law, if a man lie with a beast he shall be put to death, so also the beast. If a woman commit the offence with a beast both of them shall suffer death. That is also the punishment if a man commits this offence with a man. (159) It appears that in Athens sodomy was not a punishable offence unless committed with violence, and in such a case the punishment was not for the moral offence but for personal outrage. This vice largely prevailed in Athens. Solon himself was not proof against it. "He wrote a law forbidding a slave to practise gymnastics or have a boylover, thus putting the matter in the category of honourable and dignified practices, and in a way inciting the worthy to which he forbade the unworthy." (160) When however this act was done with violence, it was punished according to the discretion of

(156) Vi. V, 42 & 44 ; Y. II, 289 ; N. 12 Tit., 76 ; & Kau. IV—Ch. XIII—234.

(157) M. P. CCXXVII, 141 & 142.

(158) Zend.—Vend. Farg. VIII, 27 & 28.

(159) Lev. 20^{13-19} ; Exod. 22^{19}

(160) Plutarch's Solon—Vol. I, P. 405—407.

the jury, even with death. (161) In Rome capital punishment was prescribed by 'lex Julia' for this offence. (162) By mediæval French law bestiality was punished, both in the case of man and woman, with burning. In the case of sodomy, the penalty was mutilation for the first two offences, but burning alive for the third offence. (163) By the ancient law of England unnatural crime, committed either on man or beast was punished with burning. By 25 Hen. VIII. c. 6, confirmed by 5 Eliz. c. 17, it was made felony without the benefit of clergy. (164)

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(161) Demos. III, against Midias, P. 73, Note *a*.

(162) Just. IV—Tit. XVIII, 4.

(163) Cont. Cr. L. P. I, Ch. VI—39*f*.

(164) Black. IV—Ch. XV—P. 215.

CHAPTER X

OFFENCES AGAINST PROPERTY.

1. THEFT.

Manu divides thieves into two classes—open (prakasha) and concealed (aprakasha). "Let the king who sees (everything) through his spies, discover the two sorts of thieves who deprive others of their property, both those who (show themselves) openly and those who (lie) concealed. Among them, the open rogues (are those) who subsist by cheating in the sale of) various marketable commodities, but the conccealed rogues are burglars, robbers in forests, and so forth." (1) Narada and Brihaspati also reiterate this opinion.

Here the word 'thief' (taskara) has been used in a wider sense and includes thief, robber, cheat &c. In this section we propose to deal with the thief used in popular sense of the term.

The Hindu lawgivers distinguish theft (steyam) from robbery (sahasa). According to Manu, the taking of another man's thing in the presence of the owner and with violence, is robbery. If the offence is committed in the absence of his owner, it is theft ; so also it is theft if after taking a thing its possession is denied (hritva apahnute). (2) Kautilya defines robbery as 'sudden and direct seizure' of a thing, theft as 'fraudulent and indirect seizure'. (3)

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(1) M. IX,256 & 257. (2) M. VIII, 332.
(3) Kau. III—Ch. XVII—192.

Narada distinguishes them by defining robbery as the taking of a thing by forcible attack and theft when the act is done with fraud (i.e. without the knowledge of the owner). (4) Brihaspati defines robbery as "theft (or taking) coupled with violence, which springs from either wrath or avarice". (5)

Laws relating to theft and adultery are most comprehensive and numerous. The king is exhorted to punish the thief as well as the adulterer. It was considered the highest duty of the king to protect the realm from thieves, robbers, and those who violate other people's wives. Nay in the case of theft it was insisted that if the king was unable to trace the thief and the stolen property, he himself must compensate the aggrieved person from his own treasury.

Various punishments have been recommended for theft e.g., death, mutilation, imprisonment, branding and banishment (for Brahmanas) and fine. These punishments are to be inflicted, according to the value of the things stolen. The higher the value of the article stolen, the higher is the punishment. It should be noticed that in cases where for the theft of valuable articles death is to be inflicted, it should be done only when the thief has been caught with the stolen property and the implements with which he committed the offence. (6)

Yagnavalkya divides theft into three classes viz., the theft of small (inferior) articles, that of middling articles and that of superior things. Punishments should be according to the value of the things stolen. (7) But he does not enumerate the things which belong to each class. This, however, has been done by Narada. According to

(4) N. 14 Tit., 12.

(5) Brih. XXII, 23.

(6) M. IX, 270. (7) Y. II, 275.

him theft should be divided into three classes in consideration of the value of the thing stolen. "Earthenware, a seat, a couch, bone, wood, leather, grass, and the like, legume, grain, and prepared food, these are termed articles of small value. Clothes made of other material than silk, cattle other than cows, and metals other than gold, are (termed) articles of middling value, and so are rice and barley. Gold, precious stones, silk, women, men, cows, elephants, horses, and what belongs to a god, a Brahman, or a king, these are regarded as articles of superior value." (8)

THEFT OF ARTICLES OF SUPERIOR VALUE.

For the theft of gold, silver and precious clothes more than hundred palas in weight, Manu, Vishnu, Narada, Agni and Matsya Puranas lay down corporal or capital punishment. (9) When the quantity is less than hundred palas but more than fifty palas the punishment should be mutilation of hands, and when it is less than fifty palas eleven times the value shall be imposed as fine. (10) For the theft of precious gems and jewels corporal punishment has been prescribed by Manu, Narada and Matsya Purana, but Vishnu recommends the highest amercement. (11) For the theft of valuable animals like elephants, horses, camels &c., Manu, Yagnavalkya and Vyasa have recommended capital punishment, but Vishnu lays down mutilation of a hand and a foot. According to Narada highest, middlemost or lowest amercement should be

(8) N. Tit. XIV, 13—16.

(9) M. VIII, 321 ; Vi. V, 13 ; N. N. M., 27 ; Ag. P. CCXXVII, 32—38 ; M. P. CCXXVII, 101—105.

(10) M. VIII, 322 ; & Vi. V, 81 & 82.

(11) M. VIII, 323 ; N. N. M., 27 ; & Vi. V, 87 ; M. P. CCXXVII, 101—105.

imposed according to the kind of animal stolen. (12)

THEFT OF ARTICLES OF MIDDLING VALUE.

According to Manu for stealing large animals, the king should fix the punishment after considering the time and motive of the theft. Vishnu prescribes the mutilation of a hand for stealing a goat, and Vyasa lays down mutilation of a foot for the theft of inferior animals. (13)

For the theft of rice, more than ten 'kumbhas' (jars) in quantity, corporal punishment has been laid down by Manu, Vishnu, Narada, Brihaspati, Agni Purana and Matsya Purana. But if the quantity be less than ten 'kumbhas', a fine of eleven times the value shall be imposed. (14)

THEFT OF ARTICLES OF INFERIOR VALUE.

For the theft of thread, cotton, intoxicating drugs, molasses, curd, condensed milk, whey, spirituous liquor, grass, salt, oil, clarified butter, meat, honey, rice and other food, vessels made of bamboo, cane or earth, cow-dung, earth, ashes &c., Manu, Vyasa and Matsya Purana prescribe a fine of double the value, Vishnu thrice the value, and Narada five times the value. (15)

For stealing flowers, yellow paddy in the field, shrubs,

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(12) M. IX, 280 ; Y. II, 273 ; Vyasa—Punishment for unknown thieves—V. Chin. ; Vi. V, 77 ; & N. N. M., 29.

(13) M. VIII, 324 ; Vi. V, 76 ; & Vyasa—Punishment for unknown thieves—V. Chin.

(14) M. VIII, 320 ; Vi. V, 12 & 79 ; N. N. M., 26 ; Brih. XXII, 21 ; Ag. P. CCXXVII, 32—38 ; & M. P. CCXXVII, 100.

(15) M. VIII, 326—329 ; Vyasa—Punishment for unknown thieves—V. Chin. ; M. P. CCXXVII, 106—108 ; Vi. V, 83 & 84 ; N. N. M., 22—24.

creepers, plants &c., a fine of 5 krishnalas has been laid down by Gautama, Manu and Vishnu. Narada recommends a fine of five times the value. Brihaspati is very severe and expresses the opinion that in such a case the thief 'deserves to have a hand cut off'. Matsya Purana recommends a fine of 5 mashas. (16)

For the theft of vegetables, roots and fruits, and husked paddy, Gautama and Vishnu recommend a fine of 5 krishnalas. Manu prescribes a fine of 50 panas if the thief be a near relative of the owner, otherwise a fine of 100 panas. Narada prescribes a fine of five times the value. But if these articles are prepared for use, the punishment shall be first amercement, acccording to Manu. (17)

According to Vishnu theft of articles that have not been specified shall be punished with a fine equal to the value of the goods stolen. (18)

It is unnecessary to recount all the details mentioned by Manu.

PICK-POCKETTING.

Manu and Yagnavalkya prescribe the mutilation of two fingers for the first offence of a pickpocket (cutpurse), the mutilation of a hand and a foot for the second offence, and death for the third offence according to Manu. Vishnu recommends mutilation of a hand for cutpurses. (19)

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(16) G. XII, 18 ; M. VIII, 330 ; Vi. V, 85 ; N. N. M., 22—24 ; Brih. XXII, 20 ; M. P. CCXXVII, 109—111.

(17) G. XII, 18 ; Vi. V, 86 ; M. VIII, 331 & 333 ; N. N. M., 22—24.

(18) Vi. V, 88.

(19) M. IX, 277 ; Y. II, 274 ; & Vi. V, 136.

EXCEPTIONS.

Although the taking of another man's property without his permission was punished as theft yet there were exceptions to this general rule. Thus according to Manu, "(The taking of) roots and of fruit from trees, of wood for a (sacrificial) fire, and of grass for feeding cows" is not theft. That is also the opinion of Apastamba, Gautama and Yagnavalkya and others though they differ in minor details. Commentators explain that this is not theft when the things have been taken from an unenclosed ground. (20)

Apastamba would exonerate a man who takes food 'when he is in danger of his life'. So also Manu is of opinion that "a twice-born man, who is travelling and whose provisions are exhausted, shall not be fined, if he takes two stalks of sugar cane or two (esculent) roots from the field of another man." (21) It is not clear whether a Sudra is excluded from the benefit of this law. If so then it is carrying race-consciousness too far.

DETERRENT PUNISHMENT.

Manu makes a general statement to the effect that in order to prevent the repetition of the crime (pratyadeshaya), the king should cut off that limb of the thief with which he has committed the offence. That is also the opinion of Narada and Katyayana. (22) It is not clear when this deterrent punishment should be inflicted. The explanation of Kulluka is not at all plausible. Are we to

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(20) M. VIII, 339; Ap. I, 28, 3; G. XII, 28; & Y. II, 166; M. P. CCXXVII, 112—117.

(21) Ap. II, 28, 12; M. VIII, 341; & M. P. CCXXVII, 109—111.

(22) M. VIII, 334; & N. N. M., 34; Katyayana—Punishment of unknown thieves—V. Chin.

suppose that such a deterrent punishment is to be inflicted in the case of notorious thieves ? The evidence of Narada is in support of this view. He says, "Let him inflict a specially heavy punishment on a specially criminal thief, or (a lighter one) on one whose offence is less heavy. But let him not (punish a habitual thief) in the same way as for the first offence". (23) Does Yagnavalkya also mean the same thing when he says that after returning the stolen article to the owner, the thief shall be punished with various kinds of corporal punishments ? Vijnaneswar explains this as the punishment for the theft of superior articles. (24)

LAWS OF OTHER COUNTRIES.

The Babylonian law regarded theft as a civil wrong for which compensation was to be paid to the owner of the stolen goods. But when a man committed theft when extinguishing a fire, he was slain by being thrown into the fire. (25) In Persia the thief was punished with fine or imprisonment, or hard labour, or by branding. In the Sassanian period, in case of repetition, amputation of ears and hands and even hanging was resorted to. (26) According to the Mosaic law theft was regarded as a civil wrong for which double, quadruple or five times the value of things stolen had to be restored to the owner. (27) At Athens "theft might be dealt with as a civil offence by the party injured, though even then it drew with it some penal consequences, as a verdict against the thief was attended with disfranchisement". It was the option of

(23) N. N. M., 35.
(24) Y. II, 270.
(25) Ham., 25, 113, 259, & 260.
(26) Zoroastrian Civilisation—Ch. XIII & L.
(27) Exod. $22^{1,4}$.

the owner to elect between civil and criminal actions. If he did not proceed against the thief any Athenian could bring a criminal action against the thief. "Stealing anything in the night time, or from the gymnasia, or stealing in the daytime to a greater amount than fifty drachms, or from the baths or the harbour to a greater amount than ten drachms, was punishable with death. When the thief was caught in the act of stealing, the owner of the goods might carry him off at once to the Eleven, and have him sent into prison ; or if he was afraid to do it himself, he might bring the magistry to the spot and get them to do it for him." (28) At Rome the Twelve Tables divided theft into two classes—'furtum manifestum (i.e. taken in the act), and 'furtum nec manifestum' (i.e. not taken in the act). A freeman caught red handed was scourged and was handed over the owner of the goods by 'addictro', but if the thief was a slave he was scourged and hurled from the Tarpeian rock. Even a thief, who was a minor, was scourged and compelled to pay damages. In case a private property was stolen the aggrieved person could elect between civil and criminal actions. In 'furtum nec manifestum', the offender had to pay double the value of the stolen thing. In Imperial Rome theft was regarded as a civil wrong. "The penalty of committing a manifest theft is quadruple, whether the thief is free or bond ; and the penalty of committing a theft not manifest is double the value of the thing stolen." (29)

In mediæval France theft or 'larceny' was regarded as a capital crime. The thief taken in the act was more severely dealt with. In the early period though the Salic law regarded theft as merely a private wrong, the Imperial capitularies punished the offence with great severity—'the thief was to have his eyes put out ; for the second

(28) Demos. III, App. VIII, P. 349 ; * Note in P. 147—Orations against Androtion ; Historical Jurisprudence—IX—P. 177.

(29) T. T. 8^{14-16} ; Just. IV. Tit. I, 5.

offence his nose was cut off; for a third he was condemned to death'. In the mediæval Custumals these punishments were retained. Thus, the thief was punished with death, or loss of eyes or nose, according to the value of the animal stolen. Certain thefts were dealt with greater severity and punished with death 'according to the circumstances of the crime or the rank of the persons', while petty thefts were leniently dealt with and were punishable only with fine or banishment. According to Bouteiller if a thief was caught in the act of stealing a thing of more than 5 sous in value, he was guilty of a capital crime ; but if the value was 5 sous or less, he was punished for the first offence with the loss of ear, on repetition with death. But if the thief was not taken in the act he was punished either with a fine of fourfold value or by whipping in default. (30)

The mediæval English law relating to theft is most confusing and unsystematic. It betrays a lack of clear thinking and correct grasp of the subject. Unnecessary and arbitary distinctions have often been made. Punishments are brutal and quite out of proportion to the gravity of the offence.

Larceny is of two kinds, simple and compound—the first is 'where theft is unaccompanied with any other atrocious circumstances', the latter when the offence is accompanied with aggravating circumstances e.g., 'taking from one's person or house'. In the case of simple larceny when the value of the goods is 12 pence or less it is petit larceny, when above it is grand larceny. "The property in a theft must be 'personal' : and if it is a thing 'real' or savour of realty (corn, grass, trees, ores of mine, bonds, bills and notes &c.), larceny at Common law can not be committed."

(30) Cont. Cr. L. Part I—Ch. VI—39f.

According to the ancient Saxon law, if a person committed theft of above the value of 12 pence, he was liable to punishment with death, but he was allowed 'to redeem his life by a pecuniary ransom'. Since the reign of Henry I this power of redemption has been abolished, and all such persons have been directed to be hanged. But as this is a clergyable offence they are excused the pains of death for the first offence, though 'in many cases of simple larceny the benefit of clergy has been taken away by statute'. Petit larceny is punished with imprisonment or whipping at Common law or by 4 Geo. I. c. 11. with transportation which may extend to 7 years. By several acts of Parliament the benefit of clergy has been taken away from almost every kind of larcenies committed in a house. Larceny from the person above the value of 12 pence is a felony from which benefit of clergy has been taken away by 8 Eliz. c. 44. (31)

2. ROBBERY.

The term *sahasa* has been used by Hindu lawgivers in two senses. In a wider sense it means any illegal act which is performed with force or violence—thus rape is a kind of sahasa, so also are murder and mischief. (32) But in a narrower and popular sense it means robbery, i.e., 'taking another man's property by force and in his presence'. (33)

A robber or any other man who commits violence is considered much more heinous than a thief, a defamer and a man who hurts with a staff ; so a righteous and energetic king should never fail to punish him. These men are a terror to his subjects, so for no consideration whatsoever should

(31) Black. IV—Ch. XVII—PP. 229—241.

(32) N. 14 Tit., 1—6 ; Brih. XXII, 1.

(33) M. VIII, 232 ; Kau. III—Ch. XVI, 192 ; 14 Tit., 12 ; Brih. XXII, 23.

they be pardoned. (34) Every one has the right to take up arms to ward off the attacks of these dangerous men. They can be even killed with impunity. Though Manu is very severe with them he does not lay down any specific punishment for them. Vishnu prescribes capital punishment for robbers. (35)

According to Kautilya the punishment of robbery shall be proportionate to the gravity of the offence. He prescribes different fines ranging from 12 panas upwards for the taking of things and animals of different values. (36)

Narada divides Sahasa (robbery and other violence) into three classes. In his opinion punishment should be proportionate to the gravity of the offence, ranging from a fine of 100 panas to corporal punishment. Thus for Sahasa of the first degree he recommends a fine of not less than 100 panas (and not more than 499 panas), for that of the second degree a fine of at least 500 panas (not exceeding 999 panas), and for Sahasa of the highest degree a fine amounting to not less than a thousand panas. In the last case corporal punishment, confiscation of entire property, banishment and branding or mutilation of the offending limb may be inflicted. (37)

Like Narada Brihaspati also divides robbery (Sahasa) into three kinds : that of the lowest, second or highest degree. The punishment also is to vary according to the nature of the article taken. Thus, according to him, "he who destroys or takes implements of husbandry, an embankment, flowers, roots, fruits, shall be fined a hundred (panas) or more, according (to the nature of his offence). So one injuring or stealing cattle, clothes, food, drinks, or

(34) M. VIII, 344—347. (35) Vi. V, 11.
(36) Kau. III—Ch. XVII, 192.
(37) N. 14 Tit., 3—10.

household utensils shall be compelled to pay a fine of not less than two hundred (panas), like a thief. In the case of women, men, gold, gems, the property of a deity or Brahmana, silk and (other) precious things, the fine shall be equal to the value (of the article stolen). Or the double amount shall be inflicted by the king as a fine ; or the thief shall be executed, to prevent a repetition (of the offence)." (38)

As has been noticed in Book I, aiding and abetting in a Sahasa was equally criminal and in some cases they were more criminal than the actual perpetrators.

Now let us examine the laws of other peoples.

In Babylon a robber was capitally punished. But if a robber was not taken the sheriff, in whose jurisdiction 'the theft' (robbery ?) was committed, was to compensate the sufferer. (9) This reminds us of the law of Narada which provides, "He on whose ground a robbery has been committed, must trace the thieves (robbers) to the best of his power, or else he must make good what has been stolen, unless the footmarks can be traced from that ground (into another man's ground). When the footmarks, after leaving the ground, are lost and cannot be traced any further, the neighbours, inspectors of the road, and governors of that region shall be made responsible for the loss." Again, "when a house has been plundered, the king shall cause the thief-catchers, the guards, and the inhabitants of that kingdom to make good the loss, when the thief (robber) is not caught". (40)

The Mosaic law also prescribes capital punishment for robbery. (41) In Athens, when a robbery was com-

(38) Brih. XXII, 23—28.
(39) Ham., 23 & 24. (40) N. N. M., 16—18.
(41) Ezek. $18^{10,13}$

mitted the party robbed could arrest the robber and carry him at once to the Eleven. If he was afraid of doing this he could procure the assistance of the magistrates to apprehend the culprit. If the prisoner admitted his guilt he was immediately put to death without any formal trial. If he denied the charge he was tried by the jury. (42)

In Rome 'rapina' or robbery was generally regarded as a civil wrong. In mediæval France robbery was capitally punished. (43) According to the English law robbery was a felony from which the benefit of clergy was taken away by 23 Hen. VIII c. 1, and other statutes. But up to the reign of William and Mary only robberies committed in a dwelling house or in or near the king's highway were deprived of the benefit of clergy, so that those committed in a distant field or a footpath was not punished with death. But 3 & 4 W. & M. c 9 took away the clergy from all robberies whatsoever. (44)

3. HIGHWAY ROBBERY.

The Hindu law was very severe against highwaymen who made roads unsafe by their depredations. According to Kautilya highway robbers (pathibeshma pratirodhakan) shall be impaled. Brihaspati prescribes hanging for them. Katyayana also prescribes capital punishment for this offence. (45)

In ancient Persia, 'the highwayman who robbed a person without causing bodily injury, escaped with lighter punishment, but if he caused bodily injury he was to be hanged. In some cases he was punished with imprison-

(42) Demos. III, App. VIII, P. 350.

(43) Cont. Cr. L. Part I—Ch. VI—39f.

(44) Black. IV—Ch. XVII—Pp. 242 & 243.

(45) Kau. IV—Ch. XI—227 ; Brih. XXII, 17 ; & Katyayana—Nonperformance of Agreement—V. Chin.

ment for life'. (46) In Athens also the highwayman was punished with death. (47) In mediæval France highway robbery was a capital offence—nay some Custumals regarded it as treason. (48) We have already seen that in England robbery committed in a king's highway was capitally punished.

4. BURGLARY & HOUSE-BREAKING.

Manu is very severe with burglars (who commit theft in the night by breaking into house) and recommends that their hands shall be first cut off and then they shall be impaled. (49) For opening a locked house, Vishnu prescribes a fine of 100 panas and Yagnavalkya lays down a fine of 50 panas for opening the door of a closed house. (50) This light punishment is not for burglary but for house-breaking only. Kautilya recommends impaling for burglars (who commits theft by house-breaking). But for breaking open the sealed door of a house (Samudram grihamudvindatah) he prescribes a fine of 48 panas only. (51) Brihaspati also recommends impaling for burglary. (52) According to Matsya Purana burglars should be deprived of their hands and impaled or they should be drowned. (53)

In Babylon the house-breaker was put to death. (54) The Mosaic law permitted the killing of a burglar at night, but not 'if the sun be risen upon him'. (55) In Athens

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(46) Zoroastrian Civilisation—Criminal offences & their punishments Ch.—L.

(47) Ency. of Rel. & Eth. (Greek) Crime & Punishment.

(48) Cont. Cr. L.—Part I—Ch. VI—39f.

(49) M. IX, 276.

(50) Vi. V, 117; & Y. II, 233.

(51) Kau. IV—Ch. XI—227; & III—Ch. XX—198.

(52) Brih. XXII, 17. (53) M. P. CCXXVII, 170.

(54) Ham., 21. (55) Exod. $22^{2\cdot3}$.

the burglar was capitally punished. (56) In England burglary was, at Common law, a felony within the benefit of clergy. But 1 Edw. VI. c. 12, & 18 Eliz. c. 7 debarred the principal from it, and 3 & 4 W. & M. c. 9 deprived the abettors and accessories before the fact of the privilege.

5. CRIMINAL BREACH OF TRUST AND CRIMINAL MISAPPROPRIATION.

A. Criminal Breach of Trust by Guardians & Trustees.

Manu prescribes the punishment for theft for guardians of female relatives dependent on them, if they appropriate their property. It appears the same punishment would be inflicted on the guardians of minors For Narada lays down that the laws relating to deposit shall apply to the case where a man takes charge of a wealthy boy, so that for the breach of trust committed in respect of the ward's property the guardian shall be punished as a thief. Agni Purana also expresses the same view. (57)

B. Breach of Trust in respect of a deposit.

For misappropriating or refusing to return a deposit or denying the fact of deposit, Manu prescribes either the punishment for theft or a fine of the value of the deposit. The commentators explain that the punishment for theft shall be inflicted in bad cases or in cases of a repetition of the offence or when the article misappropriated is of a high value. The fine should be imposed when the offence is petty or is the first offence. (58) According to Vishnu, he who refuses to return a deposit shall be compelled to return it with the increase and shall be punished like a thief. (59) In the opinion of Kautilya if the depositary dishonestly denies the fact of deposit he shall not only restore it

(56) Demos. III—P. 154, Note 3.
(57) M VIII, 29 ; N. 2nd. Tit., 15 ; Ag. P. CCXXVII—1—17.
(58) M. VIII, 190—192. (59) Vi. V, 169 & 170.

but also be liable to be punished like a thief. (60) Narada lays down if a depositary fails to restore the deposit he shall pay an equivalent sum and shall be punished like a thief. (61) According to Brihaspati if the depositary dishonestly denies the deposit and is convicted by evidence or ordeal he shall be compelled to give back the deposit and to pay an equal amount as fine. (62) The recommendations of Matsya Purana are similar to those of Manu. (63)

It should be noticed that when owing to an act of God (and not through his own negligence) the depositary fails to return the deposit he is not liable to be punished unless he has taken a part of it. So when the deposit is stolen by a thief, or washed by flood, or burnt by fire, or even, according to Brihaspati, lost by the act of the king, the depositor is held innocent. (64)

According to Kautilya when a depositary converts to his own use a deposit he shall be compelled to pay compensation as well as a fine of 12 panas. (65) According to Yagnavalkya for wilfully converting a deposit into his means of livelihood the depositary shall be punished and compelled to return it with increase (when he uses it to make money by trading with it—Mitakshara). (66) Narada entertains the same view, while Brihaspati says that the king shall compel the depositary to pay a fine and restore its value together with the interest. (67)

C. Misappropriation.

Regarding the misappropriation of state property by

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(60) Kau. III—Ch. XII—180.
(61) N. 2nd Tit., 7, 13 & 14. (62) Brih. XIII, 13.
(63) M. P. CCXXVII, 2.
(64) M. VIII, 189 ; N. 2nd Tit., 12 ; Brih. XII, 10 & 11.
(65) Kau. III—Ch. XII—178.
(66) Y. II, 67. (67) N. 2nd Tit., 8 ; Brih. XII, 12.

a public servant Kautilya opines, "In all departments, whoever, whether an officer (Yukta), a clerk (upajukta) or a servant (tatpurusha), misappropriates sums from one to four annas or any other valuable things he shall be punished with the first, middlemost, and highest amercements and death respectively". (68) For misappropriating a common or public property, Vishnu and Yagnavalkya prescribe a fine of 100 panas. (69) For misappropriating the goods of a guild or a corporation, Vishnu lays down banishment. According to Yagnavalkya if a man misappropriates a property received in his official or rather representative capacity (samuhakaryaprahita), he shall be compelled to pay a fine of eleven times the value of it. (70)

According to Kautilya if a man who collects the money of a family or gens, misappropriates it, he shall be punished with a fine of 100 panas. (71) If a bearer misappropriates a thing which has been sent for another, he shall, according to Vishnu, be punished with the same fine. (72)

In Babylonian law breach of trust and misappropriation was generally regarded as a civil wrong for which the offender was compelled to restore the deposit and to pay double the value of it in addition. In some cases, however, the offender was punished with mutilation. (73) According to Mosaic law if a man does not restore the pledge he shall be put to death. (74) In Athens 'guardians were indictable for any breach of trust or duty to their wards; as for neglecting their maintenance and education,

(68) Kau. II—Ch. V, 59. (69) Vi. V, III; Y. II, 236.
(70) Vi. V, 167; & Y. II, 190.
(71) Kau. III—Ch. XX—199. (72) Vi. V, 112.
(73) Ham., 112, 120, 124, 253, 255, 256, 265.
(74) Ezek. $18^{12,13}$.

or not managing their property to the best advantage. ...' disfranchisement or even severer punishments attended the breach of their duties, besides pecuniary compensation for any fraud which had been committed. (75) In Rome breach of trust and criminal misappropriation were regarded as a civil wrong for which mixed actions were allowed, i.e. the party aggrieved might sue for the penalty only (for double value) to be paid to him or he might bring an action demanding the thing as well as penalty. (76) According to the English law misappropriation of public money was a 'misprision' and was punished with fine and imprisonment. It is curious that in some cases this offence was punished with the greatest severity, e.g. the officers or servants of the Bank of England embezzling its money was, by 15 Geo. II. c. 13, held guilty of felony without the benefit of clergy. (77)

6. RECEIVING STOLEN PROPERTY.

Laws relating to the stolen property are comprehensive and thoroughgoing. They show the legal wisdom of the Hindu lawgivers to the best advantage. In point of excellence, the clear understanding of the essence of crime, and the deep anxiety to do justice to all concerned, there is hardly any parallel to it in any ancient or mediæval country.

He who purchases an article knowing it to be stolen, secretly, or in the interior of a house, or outside the village, or at night, or at a reduced price, or from a notoriously dishonest person, or from a slave who has not been authorised by his master, is guilty of receiving stolen article (if the

(75) Demos. III—App. VIII—P. 352.
(76) T. T. $8^{19,20}$; & Just. IV—Tit. VI, 18 & 19.
(77) Black. IV—Ch. IX—P. 121 ; & Ch. XVII, P. 234.

article is found to be stolen). (78) But if the purchase is made without such knowledge, openly, or with previous announcement to the king or a royal officer, or in a place surrounded by shops and at a fair price, the purchaser is not guilty of theft. (79)

Moreover, if the purchaser can produce the vendor, he is freed from guilt. In such a case the property will be restored to the owner, purchase money will be returned to the purchaser and the vendor shall be punished with a fine. (80) The owner also must prove his claim by satisfactory evidence, otherwise he shall be punished for putting forward false claim. (81)

It would appear from Kautilya that the owner can not take back his lost or stolen article without the permission of the court. If he does so he shall be punished with the first amercement. But Narada does not countenance such a view. For he says, "when a chattel, which had been sold by another person than the owner, has been recovered by the owner, he may keep it". (82)

The Babylonian law lays down, "If a lost article is found with another man who says he has purchased it from another man before the elders, then the purchaser shall produce the vendor and the elders, and the claimant the witnesses recognising his lost property. If the sale be proved and the claimant also establish his ownership,

(78) G. XII, 50 ; Vi. V, 161 ; Kau. IV—Ch. I, 201 ; Y. II, 168 ; N. 7 Tit., 2 & 3 ; & Brih. XIII, 10 & 11.

(79) M. VIII, 201 & 202 ; & Vi. V, 164 & 165.

(80) M. VIII, 198 ; Kau. IV—Ch. VI, 214 ; Y. II, 170 ; N. 7 Tit., 4 & 5 ; & Brih. XIII, 2—4.

(81) Kau. III—Ch. XVI—190 ; Y. II, 171 ; & Katyayana—Sale without ownership—V. Chin. ; & Brih. XIII, 5.

(82) Kau. III—Ch. XVI—190 ; & N. 7 Tit., 2.

the seller shall be held to be a thief and shall be slain. The claimant shall receive his property from the purchaser who shall receive back his purchase money from the house of the seller. But in case the purchaser does not produce the seller and the elders, but the claimant proves his ownership by witness, he shall receive back his stolen property and the purchaser shall be held as a thief and shall be slain. If the seller is dead, from his house the purchaser shall claim five-fold as the penalty in the case. If the purchaser has not the elders at hand, the judge shall give him time, up to six months. If in six months his witnesses do not appear, he has acted in bad faith; the penalty of that case he shall bear." (83)

In English law the receiver of stolen goods, who knew the articles to be stolen, was guilty as accessory to theft and felony according to 3 & 4 W. & M. c. 9, & 5 Aun. c. 31. (84)

7. CHEATING.

Cheating was regarded as a kind of theft (open) by the Hindu lawgivers.

A. Cheating in Marriage.

Though cheating in matrimonial affairs is not an offence against property , it is dealt with here for the sake of convenience.

As there is no divorce in the Hindu law and the couple are united for good and evil, and as courtship does not generally prevail among the Hindus, such laws are

(83) Ham., 9, 10, 12 & 13.

(84) Black. IV—Ch. X—13*e*.

greatly needed for the peace and happiness of the married couple. It is to be noted that the law is not partial to men but protects equally the interest of the weaker sex.

For giving a defective girl in marriage without informing the bridegroom of the defect, a man shall be punished, according to Manu, Kautilya and Matsya Purana, with a fine of 96 panas, while Vishnu prescribes a fine 100 karshapanas and Narada, 'a heavy punishment'. (85) These defects of the bride and bridegroom have been enumerated by the lawgivers. It might often happen that the bridegroom would falsely accuse the bride's party with giving a faulty girl in marriage. The lawgivers are quite alive to this and have prescribed punishment for falsely blaming a girl. Mere accusation will not due, the charge must be proved to the hilt, otherwise the accuser is liable to punishment. (86)

Kautilya is more severe with the bridegroom's party and most reasonably so, for the girl being the weaker party and indissolubly united with her husband must be protected from designing people. According to him, 'any person receiving a girl in marriage without announcing the blemishes of the bridegroom shall not only pay double the above fine, but also forfeit the sulka and stridhana (he paid to the bride).' (87) Agni Purana is no less severe. It lays down, "The man who would negotiate the marriage of the bridegroom (both the matchmaker and the bridegroom's guardian), knowingly screening his faults and defects from the guardians of the bride, should be punished with a fine of 200 panas, no matter whether such a marriage had been formally celebrated or not." (88) According to Matsya

(85) M. VIII, 205 & 224; Kau. III—Ch. XV—188; M. P. CCXXVII, 14; Vi. V, 45; & N. 12 Tit., 33.

(86) M. VIII. 225; Vi. V, 47; & N. 12 Tit., 34.

(87) Kau. III—Ch. XV—188. (88) Ag. P. CCXXVII—(1—17).

Purana, 'the man who hiding his faults marries a girl is considered not to have married at all and should pay 200 panas to the king." (89)

A fine of 200 panas has been prescribed by Kautilya for a person 'who while pretending to secure a bride to a particular person, ultimately obtains her for a third person.' (90) So also for substituting another maiden in marriage, a fine of 200 or 100 panas has been prescribed by him. This fine is to depend according to the rank and blood of the substituted girl. But the recommendation of Manu is ridiculous. For, according to him, in such a case the bridegroom may marry both the girls for the same price. (91) According to Matsya Purana the guardian of the girl is to pay the highest fine. (92) It may be incidentally mentioned here that although the Hindu law does not generally recognise divorce, yet Parasara holds a different opinion and enumerates certain circumstances under which the wife may take a second husband and it is is one of them. (93)

B. Cheating on False Pretext.

For cheating a man of his money on false pretext (such as to save him from the wrath of the king whose displeasure he is falsely given to understand to have incurred—Medhatithi and Kulluka) the cheat is to be killed with various modes of corporal punishments. This punishment should be imposed on his abettors as well. That is also the opinion of Matsya Purana. (94)

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(89) M. P. CCXXVII, 14—22.
(90) Kau. IV—Ch. XII—229.
(91) Kau. IV—Ch. XII—229 ; & M. VIII, 204.
(92) M. P. CCXXVII, 14—22.
(93) Parasara—Ch. IV, 26.
(94) M. P CCXXVII, 3.

C. Cheating by False Personation or Disguise.

Kautilya prescribes the mutilation of hands or a fine of 400 panas for a man who marries a girl by falsely personating another man who has paid the nuptial fee. Besides, he must pay the nuptial fee to the original suitor. (95)

According to Manu, Narada and Brihaspati a false astrologer who cheats others by professing to explain portents or the influence of stars, is an open thief, and shall be punished. (96)

For cheating men by assuming the disguise of a Sadhu corporal punishment has been prescribed by Brihaspati. (97) Manu prescribes the death penalty for a Sudra who wears the insignia of a Brahmana. (98) It is not clear whether this punishment is for cheating or for improper conduct.

D. Cheating by Selling Adulterated or Bad goods as Sound ones.

Manu strictly forbids the selling of adulterated articles as pure, or bad ones as good but he does not specify any punishment except in the case of bad seeds for selling which he prescribes mutilation. Kautilya prescribes a fine of 48 panas for selling bad articles, while for the sale of diseased animals as sound ones he lays down a fine of 12 panas. (99) Yagnavalkya lays down a fine of double the value for selling a bad article by concealing its defects. (100) According to Narada and Brihaspati if a merchant sells an article concealing its defect, or adulterated articles, or old articles as new, he shall be compelled to give

(95) Kau. IV—Ch. XII—229.
(96) M. IX, 258—261 ; N. N. M., 3 ; Brih. XXII, 11.
(97) Brih. XXII, 12.
(98) M. IX, 224 & N. N. M., 3.
(99) Kau. III—Ch. XX—198 ; & III—Ch. XV—188.
(100) Y. II, 257.

double the quantity to the purchaser and pay a fine of equal amount of the value to the king. (101) Agni Purana lays down that 'merchants dealing fraudulently with honest men either in respect of quality or the price of a commodity should be punished with the lowest or middling fine, and his goods shall be confiscated to the state'. (102)

E. Cheating by Selling Imitation Goods as Genuine.

Kautilya prescribes the highest amercement for selling imitation gems as genuine, the middlemost amercement in the case of superior articles, while a fine of its value in the case of inferior articles. The price also must be restored to the purchaser. (103) A fine of 100 Karshapanas has been laid down by Vishnu for selling imitation articles as genuine, while Brihaspati prescribes a fine of double the value to be paid to the king and the restoration of price to the buyer, for selling imitation gold &c. (104)

Yagnavalkya prescribes fines of different amounts for selling or mortgaging a closed box or vessel containing imitation articles, according to the price for which it is sold or the sum for which it is mortgaged. (105)

In mediæval France the mutilation of hand was the punishment for counterfeiting merchandise, while for selling such articles (not by the manufacturer) a fine of 60 sous was imposed. (106)

F. Cheating by Selling with a Standard Weight & Measure.

He who cheats others by giving a less amount of

(101) Brih. XVIII, 4 ; & XXII, 7 ; & N. 8 Tit., 7.
(102) Ag. P. CCXXVII, 51—57.
(103) Kau. II—Ch. V—58.
(104) Vi. V, 124 ; & Brih. XXII, 13 & 14.
(105) Y. II, 247 & 248. (106) Cont. Cr. L.—Part I—Ch. VI—39f.

grains by standard measure or scale shall be fined according to the amount cheated. This is the recommendation of Manu, Kautilya and Yagnavalkya. (107) It may be reasonably inferred that punishments were also inflicted in the case of other articles also.

G. Cheating by Substitution.

In the case of the substitution of cloth by washermen or of yarn by weavers a fine equal to twice the value has been recommended by Kautilya. (108)

In England cheating had been restrained and punished by various statutes. The punishment for this offence was generally fine and imprisonment. (109)

8. MALICIOUS MISCHIEF.

Mischief was regarded by the Hindu lawgivers as a kind of Sahasa or heinous crime. Narada and Brihaspati do not draw any distinction between robbery and mischief. In the same breath they declare that destroying, injuring, or taking by force such and such things is punishable with such and such penalty.

There is a general law of Manu which lays down for the mischief caused to another man's property, a fine equal to the value of the injury done and compensation to the aggrieved party. (110) Commentators explain that this law applies to the cases which have not been specifically provided for. This is a reasonable view.

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(107) M. VIII, 203 ; Kau. IV—Ch. II, – 203 ; & Y. II, 244.
(108) Kau. III—Ch. XV—188.
(109) Black. IV—Ch. XII—P. 157.
(110) M. VIII, 288.

A. Mischief by Killing or Maiming Animals.

It should be mentioned at the outset that many of the laws discussed here are not definitely clear whether they refer to mischief or to cruelty to animals.

For causing hurt to beasts, Manu holds that the offender shall be punished according to the grievousness of the hurt or the intensity of pain inflicted. (111) For killing valuable animals like elephants, horses, camels, or cows, Vishnu has prescribed mutilation of one hand or foot. Further, the offender must bear the expense of medical treatment. (112) There can be little doubt that the punishment is brutal.

According to Kautilya, if a person kills cats, dogs, mongooses, cocks &c., of less than 54 panas in value, either his nose shall be cut off or he shall pay a fine of 54 panas. If these animals belong to low caste people, half the above fine shall be levied. If he causes pain to minor quadrupeds a fine of 1 or 2 panas shall be imposed, if blood comes out the fine shall be doubled. In the case of large quadrupeds double the above fines and the cost of medical treatment shall be imposed. (113)

Yagnavalkya prescribes a fine of 2 panas or more for striking or mutilating small animals and middlemost amercement for castrating or killing them. In the cases of big animals like bulls the fines shall be double. Moreover compensation must be paid to the owners. (114)

Narada holds that for injuring or killing animals the punishment shall be proportionate to the heaviness of the offence. (115)

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(111) M. VIII, 286. (112) Vi. V, 48, 52—54, 76.
(113) Kau. IV—Ch. X—224 ; III—Ch. XIX—197.
(114) Y. II, 225 & 226. (115) N. 14 Tit., 5 & 7.

Among most of the ancient peoples this offence was regarded as a civil wrong. In mediæval England, however, malicious mischief by killing or maiming animals was regarded highly criminal. 'By 9 Geo. III. c. 29 to kill, maim or wound any cattle, or procure by gift or promise of reward any person to join them therein is a felony without benefit of clergy'. (116)

B. Mischief by Destroying Tanks, Wells &c.

For emptying the water of a tank or obstructing the flow of water, Manu prescribes the lowest amercement. In the case of breaking the dam of a tank (taragbhedakam), he insists that the offender must be killed by drowning in that water or in some other way. But if the offender repairs the damage he shall be let off with a fine of the highest class. Vishnu also prescribes death penalty in such a case. (117) According to Kautilya if any person breaks the dam of a tank, full of water, he shall be drowned in that tank, but if there be no water in that tank (anudakam) he shall pay the highest amercement. For breaking the dam of a tank which is in ruins (bhagnotshristakam) the middlemost amercement shall be imposed. (118) Yagnavalkya prescribes drowning for a woman who breaks the embankment (of a tank). He is silent as regards men. (119)

For destroying wells and embankments of tanks Sankha prescribes a fine of 800 panas. (120) Matsya Purana prescribes death by drowning for obstructing the course of water in a tank. (121) For 'diverting the water

(116) Black. IV—Ch. XVII—Pp. 244—245.
(117) M. IX, 281 ; & Vi. V, 15.
(118) Kau. IV—Ch. XI—227. (119) Y. II, 278.
(120) Sankha—Robbery & other Violence—V. Chin.
(121) M. P. CCXXVII, 171.

of a stream into another channel' Agni Purana recommends imprisonment for a month. (122)

In England, by 9 Geo. III. c. 29 unlawfully and maliciously breaking down 'the head of any fish pond whereby the fish shall be lost or destroyed or procuring of it by gift or promise of reward' was made felony without benefit of clergy. (123)

C. Mischief by the Destruction of Boundary marks.

Manu prescribes mutilation for the destruction of boundary marks. (124) But the later lawgivers are more humane and prescribe only pecuniary punishments. So Vishnu prescribes the highest amercement, Kautilya a fine of 24 panas, and Yagnavalkya and Agni Purana lowest amercement. (125)

D. Mischief by Fire.

Vishnu prescribes capital punishment for incendiaries. Kautilya, Yagnavalkya and Agni & Matsya Puranas lay down death by burning for persons who set fire to fields, pastures, houses, forests &c. (126)

If a woman commits such an offence she shall, according to Kautilya and Yagnavalkya, be torn off by a mad bull. The latter insists that the woman should suffer mutilation of limbs before she is thrown to the mad bull. The punishment is shocking and barbarous. (127)

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(122) Ag. P. CCXXVII, 32—38.

(123) Black. IV—Ch. XVII—Pp. 244—246.

(124) M. IX, 291.

(125) Vi. V, 172 ; Kau. III—Ch. IX—169 ; Y. II, 155 ; Ag. P. CCXXVII, 20—22.

(126) Vi. V, 9—11 ; Kau. IV—Ch. XI—228 ; Y. II, 282 ; Ag. P. CCXXVII, 32—39 ; & M. P. CCXXVII, 201.

(127) Kau. IV—Ch. XI—228 ; & Y. II, 279.

In Athens cases of arson were tried by Areopagus which also tried cases of murder. It would appear that the punishment was death. (128) In Rome the punishment of arson was death by burning, preceded by scourging. (129) 'In France most Custumals punish the crime of arson with death ; others are less severe, but perhaps more cruel, for they speak of the loss of eyes or some other inhuman punishment'. (130) In England by various statutes arson was made felony without benefit of clergy. Formerly the culprit was put to death by burning. (131)

E. Mischief by Causing Injury to Trees.

Mischief by causing injury to trees was punished in ancient India by fines of various amounts. According to Manu the fine should depend upon 'the usefulness of the several (kinds of) trees'. Vishnu prescribes highest amercement for cutting fruit-bearing trees, the middlemost amercement for cutting flower-bearing ones, a fine of 100 karshapanas for cutting creepers, shrubs &c., and a fine of 1 pana for mowing grass. (132)

Kautilya prescribes small fines for cutting trees, creepers, plants &c. The amount of fine should depend upon the part of the trees injured, their kind, and their situation. The recommendations of Yagnavalkya are similar to those of Kautilya, though the amounts of fine differ. (133) Matsya Purana also recommends various amounts of fine for this offence. (134)

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(128) Demos. III, App. VIII—P. 328.

(129) T. T. $8^{5,10}$.

(130) Cont. Cr. L. Part I—Ch. VI—39f.

(131) Black. IV—Ch. XVI—Pp. 220—222 ; & Ch. XVII—Pp. 244—246.

(132) M. VIII, 285 ; Vi. V, 55—59.

(133) Kau. III—Ch. XIX—197 ; & Y. II, 227—229.

(134) M. P. CCXXVII, 91—95.

In most of the ancient countries this offence was regarded as a civil wrong for which compensation was to be paid.

In England, however, this offence was severely punished, in some cases with capital punishment. By 9 Geo. III. c. 29 unlawfully or maliciously cutting down or destroying trees planted in an avenue, growing in a garden or orchard or plantations was made a felony without benefit of clergy. 'By 6 Geo. III. c. 36 ; & 48 & 13 Geo. III. c. 33, wilfully to spoil or destroy any timber or other trees, roots, shrubs, or plants, is for the first two offences liable to pecuniary penalties ; and for the third, if in the daytime, and even for the first at night the offender shall be guilty of felony, and liable to transportation for 7 years'. Comment is unnecessary.

F. Mischief Caused by the Destruction of Household Goods.

According to Manu, 'he who damages the goods of another (i.e. such objects as have not been specifically mentioned—commentators), be it intentionally or unintentionally, shall give satisfaction to the (owner) and pay to the king a fine equal to the (damage)'. Again 'in the case of (damage done to) leather, or to utensils of leather, of wood, or of clay, the fine (shall be) five times their value ; likewise in the case of (damage to) flowers, roots, and fruit'. (136) According to Kautilya, 'destruction of articles of small value shall be punished with a fine equal to the value of the articles besides the payment (to the sufferer) of an adequate compensation, destruction of big things with a compensation equal to the value of the articles and a fine equal to twice the value. In the case of destruction of such

(135) Black. IV—Ch. XVII—Pp. 245—247.

(136) M. VIII, 288 & 289.

things as clothes, gold, gold coins, and vessels or merchandise, the first amercement together with the value of the articles shall be levied'. (137) The fines prescribed by Narada are very light. For the destruction or injury to fruits, roots, agricultural utensils &c., he prescribes fines proportionate to the heaviness of the crime, but not less than 100 panas. For injuring clothes, food, drink, or household untensils, he recommends a fine of 500 panas. (138) The punishments prescribed by Brihaspati have been mentioned in connection with robbery.

G. Mischief by Causing Injury to Immovable Property.

For making a hole in another man's house, ground, or wall, Vishnu prescribes the middlemost amercement. But the fines prescribed by Kautilya and Yagnavalkya are very small, such as 3 or 6, and 10, 20 or 25 panas. (139)

9. FORCIBLE ENTRY.

For forcibly taking possession of another man's land Apastamba prescribes death for non-Brahmanas. (140) Manu prescribes a fine of 500 panas for such an offence. That is also the recommendation of Matsya Purana. (141) For the forcible occupation of fields or houses of another man Kautilya prescribes death or the highest amercement. Vriddha Manu also lays down highest amercement for such an offence. (142)

In England the punishments of forcible entry were imprisonment and fine. (143)

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(137) Kau. III—Ch. XIX—196. (138) N. 14 Tit., 4 5, & 7.
(139) Vi. V, 108 & 109 ; Kau. III—Ch. XIX—196 ; & Y. II, 223.
(140) Ap.—Punishment for unknown thieves—V. Chin.
(141) M. VIII, 264 ; M. P. CCXXVII, 29—33.
(142) Kau. IV—Ch. X—226 ; & Vr. Manu—Contests regarding boundaries—V. Chin.
(143) Black. IV—Ch. V—Pp. 147—148.

CHAPTER XI

FORGERY.

Forgery was regarded as a high crime by the Hindu lawgivers.

Manu and Vishnu prescribe the death penalty for forging a royal edict. It appears that Vishnu prescribes the same punishment for forging private documents also. (1) But the later lawgivers do not favour the extreme penalty for this offence. Thus Yagnavalkya prescribes the highest amercement for forging royal edicts and their use as genuine. Katyayana also lays down the same punishment for using fabricated documents as genuine. (2)

In Rome, if a slave committed forgery he was, according to the law of Cornelia de falsis (Testamentaria), capitally punished, but if the forgerer was a freeman he was punished with deportation. (3)

In mediæval France forgery was generally punished with pillory ; but if the offender was an officer or a notary he was capitally punished. (4)

By 5 Eliz. c. 14 forgery or the use of any forged document or deed as genuine was punished with fines

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(1) M. IX, 232 ; & Vi. V, 9 & 10.

(2) Y. II, 240 ; & Katyayana—Robbery & other violence—V. Chin. (3) Just. IV—Tit. —XVIII, 7.

(4) Cont. Cr. L. Part I—Ch. VI—39f.

payable to the aggrieved party, with pillory, loss of ears, slitting of nose and imprisonment. But for the second offence capital punishment was prescribed. By subsequent acts all kinds of forgery became capital offence even for the first offence. (5)

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(5) Black. IV—Ch. XVI—Pp. 247—249.

CHAPTER XII.

OFFENCES RELATING TO TRADE REGULATIONS.

From the conditions prevailing in modern India a layman may be naturally led to think that Indians were never a commercial people and that trade and commerce did not flourish in this country. But a peep into India's past records would give the lie to this assumption. Not only the ancient literature of India but also the accounts of foreign travellers bear conclusive testimony to the brisk trade carried on in this country. Both internal trade and commerce with other countries were in a flourishing condition. Customs-duties were an important source of the revenue of the state. Highly elaborate rules were framed to foster trade and commerce and to ensure proper collection of customs-duties. There was a department of trade and commerce under the supervision of a high official ('panyadhyaksha', or the superintendent of trade and commerce of Kautilya). Another important official ('Sulkadhyaksha', or the superintendent of tolls) was in charge of the collection of tolls and customs-duties.

1. SMUGGLING.

A. Avoiding Toll-house.

It would appear from Kautilya that in order to facilitate the collection of tolls and to make the evasion of duty difficult, commodities were not allowed to be sold in the place where they were grown or manufactured. (1) If

(1) Kau. II—Ch. XXII—113.

any one violated this rule he was punished. Somewhere near the market place the toll-house was erected where all commodities for sale were to be exhibited and proper duty to be paid.

Manu prescribes a fine of eight times the defrauded duty in case a merchant avoids the toll-house or sells or purchases at an untimely hour (with the intention of evading tolls). (2) But Vishnu is not satisfied with anything less than the total confiscation of all goods if a merchant evades the payment of toll (by avoiding the place where it is collected). Kautilya, Yagnavalkya, and Narada, however, are of the same opinion with Manu. (3)

B. False Statement of Quality or Quantity of the Goods in Order to Evade the Payment of Proper Duty.

For making false statement regarding the quality, quantity or the price of goods in order to evade the payment of proper duty, Manu, Yagnavalkya and Narada prescribe a fine of eight times the defrauded duty. (4) Kautilya recommends either the same fine or the confiscation of the excess when a false statement regarding the quantity is made. (5)

C Evading Duty by Hiding Commodities.

According to Kautilya, "Those who smuggle a part of merchandise on which toll has not been paid with that on which toll has been paid as well as those who, with a view to smuggle with one pass a second portion of merchandise, put it along with the stamped merchandise after

(2) M. VIII, 400.

(3) Vi. III, 15 & 16; Kau. II—Ch. XXI—110; Y. II, 262; & N. 3 Tit., 12 & 13.

(4) M. VIII, 400; Y. II, 262; N. 3 Tit., 12 & 13.

(5) Kau. II—Ch. XXI—110.

breaking open the bag shall forfeit the smuggled quantity and pay as much fine as is equal to the quantity smuggled." Again "for hiding inferior commodities, eight times the amount of the toll shall be imposed ; and for hiding or concealing superior commodities, they shall be wholly confiscated." (6)

In mediæval France non-payment of taxes on sales of commodities was regarded as a misdemeanour punishable with fines. (7)

In England earlier statutes punished smuggling with fines and forfeiture of goods and in daring cases even with transportation for seven years. But 19 Geo. II c. 34. 'makes all forcible acts of smuggling, carried on in defiance of the laws, or even in disguise to evade them, felony without benefit of clergy'. (8)

2. SALE OF PROHIBITED GOODS AND VIOLATION OF THE KING'S MONOPOLY.

It would appear from a careful study of the laws that the manufacture and sale of some articles was the monopoly of the state in ancient India. Any violation of this monopoly was severely dealt with.

Kautilya prescribes the highest amercement for manufacturing salt without royal license. The hermits, however, were excluded from the operation of this law. (9)

Manu recommends the confiscation of the whole property of a man who exports goods of which the king

(6) Kau. II—Ch. XXI—111—112.
(7) Cont. Cr. L. Part I—Ch. VI—39f.
(8) Black. IV—Ch. XII—P. 154.
(9) Kau. II—Ch. XII—84.

has a monopoly or on which the king has laid an embargo. (10) But according to Vishnu and Yagnavalkya if anybody attempts to sell anything forbidden by the king, he shall be punished with the confiscation of the article. (11)

According to Kautilya 'when a person imports such forbidden articles as weapons, mail armour, metals, chariots, precious stones, grains and cattle', he shall be punished as announced by the king beforehand, and the merchandise shall be confiscated. (12)

3. RAISING THE PRICES OF ARTICLES & ILLEGAL COMBINATION.

In ancient India the prices of most of the articles were fixed by the state. (13) No doubt in doing this the state was actuated by the best of motives, namely to save the consumer from the arbitary exactions of traders. Whether this interference on the part of the state is economically sound or not is a different question.

For raising the prices beyond the limit fixed by the king, Kautilya prescribes a fine, the amount of which is to depend upon the extra-profit made by the seller. (14) According to Yagnavalkya if merchants, knowing the price fixed by the state, combine to enhance or lower the price of any commodity, they shall be punished with the highest amercement. (15)

If merchants combine to boycott any foreign goods in order to purchase them at a cheaper price than laid down by the king, they shall, according to Vishnu and

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(10) M. VIII, 399. (11) Vi. V, 130 ; & Y. II, 261.
(12) Kau. II—Ch. XXI—111.
(13) M. VIII, 401 & 402 ; & Y. II, 251.
(14) Kau. IV—Ch. II—205. (15) Y. II, 249.

Yagnavalkya, be punished with the highest amercement. The same penalty shall be imposed for selling at a higher price by forming combination. (16) According to Kautilya if merchants combine either to prevent the sale of merchandise or to sell or purchase at a higher or lower price, they shall be fined 100 panas (each). (17)

In England the combination among victuallers to raise the price of food was a criminal offence, punishable with fine, imprisonment, pillory, loss of an ear &c. (18)

4. HIGH BIDDING.

It would appear from Kautilya that even in the time of bidding in an auction sale the bid could not exceed the price fixed by the king. If a bidder enhanced the price of any article beyond the fixed value from fear that some one might overbid him, he was to be punished with a fine. (19)

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(16) Vi. V, 125 ; Y. II, 250.

(17) Kau. IV—Ch. II—204. (18) Black. IV—Ch. XII—P. 159.

(19) Kau. II—Ch. XXI—110.

CHAPTER XIII

CRIMINAL BREACH OF CONTRACT.

In most countries, ancient or modern, breach of contract has generally been regarded as a civil wrong for which compensation is exacted from the breaker or in some cases specific performance is enforced. In ancient India, however, breach of contract was regarded as a criminal offence for which punishment was inflicted. But in fairness to the Hindus it should be mentioned that only in cases where the default was intentional and not due to an act of God, the breaker of the contract was liable to punishment. Thus if a servant could not perform his service-contract due to illness, he was not held responsible. Now as in most cases the breaker of a contract is actuated by a guilty intention ('malice') there is no reason why it should not be regarded as a crime. It must be remembered that the distinction between crime and civil wrong is to a great extent arbitary and in many cases accidental. In the origin the distinction had no reason or principle behind it. It is only in modern times that an attempt has been made to find out some underlying principle. The distinction even nowadays follows more often history than reason. If cheating is a crime there is no reason why breach of contract should not be viewed as such. The arguments which would be put forward against it are not all at convincing. It may be said that state is not interested in this case. But the answer is that state may be interested if it likes. The peace of the country may be disturbed as much by breach of contract as by cheating.

1. BREACH OF MARRIAGE CONTRACT.

Marriage, according to the Hindus, is not a contract by 'Sanskara' or religious ceremony. So, while in the case of other peoples dissolution of marriage is allowed, in the case of the Hindus marriage-tie can not be severed. But although marriage is not a contract there may be implied or express contract as regards the taking or giving in marriage. For the violation of such contracts punishment has been prescribed by the lawgivers.

But it should be noticed that though breach of marriage contract is generally punishable, under certain circumstances it is not an offence, e.g., when after the betrothal and before the final ceremony some concealed defects of the bride or bridegroom are revealed. In such a case the other party has the right to break the contract. Yagnavalkya would go further. He holds that in case a better bride-groom is available, any former contract with any bride-groom may be broken with impunity. (1) Evidently this preferential treatment is due to consideration shown to the weaker party.

According to Vishnu if a man having betrothed his daughter to one man gives her to another he shall be punished as a thief, unless the first suitor has a secret blemish. So also a bride-groom who abandons a faultless girl who has been betrothed to him, shall be similarly punished. (2) The same punishment is prescribed by Yagnavalkya for not giving a girl in marriage after betrothal except when a better bride-groom is available. So also a bride-groom who forsakes a faultless maiden after betrothal shall be punished with the highest amercement. If, in order to forsake the girl, he falsely defames her, he shall be punished

(1) Y. I, 65 & 66.

(2) Vi. V, 160—162.

with hundred times the highest amercement. (3) Narada also prescribes the punishment for theft for the bride's party and a fine for the bridegroom who must be compelled to marry the girl. (4)

2. BREACH OF SERVICE CONTRACT.

A. On the Part of the Employee.

Breach of service contract on the part of the employee is punishable only when it is due to insolence, impertinence, or any other unreasonable cause. When the servant is not able to do it (i.e., beyond his capacity), or if there be any legitimate reason e.g., family troubles, diesase and calamities, the non-performance of the work as agreed upon is not punishable.

According Apastamba if ploughmen or herdsmen do not perform their duties they shall be beaten. It appears this punishment is extra-legal. (5)

If a hired servant or workman who is not ill does not perform his work as agreed upon, out of insolence, he shall, according to Manu, be punished with a fine of 8 krishnalas and shall not receive his wages. But in case he is ill and performs his work after the recovery, he is entitled to his wages. He shall not get his remuneration if he does not do so after his recovery or have it done by a substitute, even though only a small part is left unfinished. (6)

Vishnu recommends that if a hired workman or

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(3) Y. I, 65 & 66.
(4) N. 12 Tit., 32 & 35.
(5) Ap. II—11—28, (2—3).
(6) M. VIII, 215—217.

servant leaves his work before the expiry of his term, he shall be fined 100 panas and shall not receive his wages. (7)

According to Kautilya, if a servant who has received his wages does not perform the work according to the agreement, he shall be fined 12 panas and may be put under confinement and compelled to do the work. But when he is incapable of doing the work, or if the work be too mean, or if he is ill or afflicted with family troubles and calamities, he shall be excused, and may be permitted to have the work done by another man. (8)

Yagnavalkya appears to treat such breach of service contract as civil wrong. For he lays down if a servant who has received his wages does not perform the work agreed upon, he shall give twice the amount of wages to his master; if he has not received any wages then the compensation should be same as the wages. (9)

That is also the opinion of Narada. According to him if a servant who has promised to perform a work does not do it, he shall be forced to do it and his wages should be paid; but he who has received his wages and does not perform the work he shall pay twice the wages to the master. (10)

According to Brihaspati if a servant fails to do his work he shall not get his wages and may be sued. If he does not perform the work after having received his wages, he must restore it to his master and pay a fine of double the amount to the king. And 'he who has promised (to do a work) and does not perform it, shall be compelled to do so by forcible means even; and if, through obstinacy,

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(7) Vi. V, 153—154.
(8) Kau. III—Ch. XIV—185.
(9) Y. II, 193.
(10) N. 6 Tit., 5.

such a servant should not still do it as engaged for, he shall be fined 8 krishnalas, and his wages shall not be paid to him'. (11) That is also the opinion of Agni Purana. (12)

B. On the part of the Employer.

If a servant who is not negligent of his work, is discharged before the expiry of the period of contract, his wages shall be paid in full and the master shall further pay a fine of 100 panas to the king. This is the recommendation of Vishnu. (13) Agni Purana prescribes a fine of one suvarna for such a master. (14)

NONPAYMENT OF WAGES.

According to Kautilya, if a master do not pay the stipulated wages to his servants or workmen, he shall be punished with a fine of one-tenth amount of the wages (dashabandhah), or of 6 panas (15) Brihaspati also recommends a fine and payment of wages in such a case. (16) According to Matsya Purana, if a master does not pay wages to his servants, he shall be fined 100 krishnalas. (17)

3. NON-DELIVERY OF GOODS PAID FOR OR AGREED UPON.

Vishnu prescribes a fine of 100 panas for the seller who does not deliver a commodity to the purchaser who has paid the price. Moreover, he shall be compelled to make it over together with the proper interest on the money paid. The fine recommended by Kautilya in such a case is 12 panas only. (18)

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(11) Brih. XVI—14—16 (12) Ag. P. CCXVII—(1—17).
(13) Vi. V, 157—159. (14) Ag. P. CCXXVII—(1—17).
(15) Kau. III—Ch. XIII—184. (16) Brih. XVI—18.
(17) M. P. CCXXVII—9—13.
(18) Vi. V, 127 & 128; Kau. III—Ch. XV—188.

According to Agni & Matsya Puranas, if a man enters into a contract with another for the sale of a particular commodity and sells it to a third person, he shall be fined 600 panas. (19)

The Hindu lawgivers lay such emphasis on the sanctity of contract that even the breach of contract on the part of a prostitute or her paramour has not escaped their attention. (20)

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(19) Ag. P. CCXXVII—18.

(20) Kau. II—XXVII—125 ; Y. II, 292 ; N. 6 Tit., 18.

CHAPTER XIV.

CRIMINAL INTIMIDATION.

According to Kautilya, if a person intimidate another by saying, "I shall do this to you" (ebam tvam karishyami), he shall be punished with half the punishment which is the penalty of the actual act. If the person who intimidates is incapable of doing that act, or if he intimidates out of anger, intoxication or loss of sense, he shall be punished with a fine of 12 panas only. If he is able to carry out his threat he must give life-long security for the safety of that man. (1)

According to Yagnavalkya, he who intimidates another by saying that he will destroy his arms, neck, eyes, thigh, shall be punished with a fine of 100 panas; but half of that fine shall be levied when the loss of hand, leg, nose or ear is threatened. If the man is (physically) incapable of carrying out the threat, he shall be fined 10 panas only. If he is able, he shall not only be fined but furnish also surety for the future safety of the intimidated man. (2)

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(1) Kau. III—Ch. XVIII—194. (2) Y. II, 208 & 209.

CHAPTER XV

ABUSE, INSULT & DEFAMATION. (*Vakparushya*).

'Vakparushya' has been rendered into English by many as 'Defamation'. But this is not an exact translation. Defamation is used in a particular sense in modern legal parlance. In order to constitute defamation an expression, a gesture, a written statement or picture or anything of the kind must be published to others, 'intending to harm or knowing or having reason to believe that such imputation will harm the reputation of such a person'. This is the modern definition of defamation. So, when a person calls another a fool, not in the presence of a third person, it is insult or abuse, not defamation. Now the Hindu lawgivers include much more than actual defamation in the term 'Vakparushya'. It includes insult, abuse and defamation. It is not also proper to translate it as merely 'abuse'. For, when a man calls a lame man lame, it is not abuse but taunt. Or when the defects of a maiden (true or false) are publised to others, it is defamation and not abuse.

The most important characteristic of the laws concerning 'Vakparushya' is that the nature and amount of punishment depends upon the caste of the offender and of the offended. When the offender is of a higher caste the punishment (generally fine) is lighter, when he is of lower caste it is heavier. In the case of a lowcaste the punishment is sometimes as severe as the cutting off of the tongue &c.

So also the punishment is heavier when the wives of other people are abused. That is also the case when some particular persons deserving special consideration or respect are reviled.

It may be noticed here that some lawgivers (e.g. Narada) would like to authorise men of superior castes, insulted or abused by 'a low person abhorred by men', such as Chandala, Nishada, Swapaka, Meda &c., to take the law in their own hands and punish the offender themselves, without having recourse to the law-court. (1)

The nature and amount of punishment depends upon the nature of the offensive remark or expression. According to Manu, when filthy langugage is used the fine shall be double than for mere abusive expressions. (2) Narada divides 'vakparushya' into three classes e.g., 'nisthura' (cruel), 'aslila' (obscene or filthy), and 'tibra' (harsh). He explains, "Abuse combined with reproaches has to be regarded as nisthura, abuse couched in insulting language is aslila ; charging one with an offence, causing expulsion from caste is called tibra by the learned". (3)

Brihaspati also classifies 'vakparushya' into three species:—that of the first (or lowest), middlemost, and highest degree. He defines them thus:—"Abuse of the first (or lowest) degree means offensive language against or defamation of, a country, village, family, or the like, without (mentioning) an (individual ignominious) act. Referring (in terms of contempt) to a man's sister or mother, or charging him with a minor sin, is termed abuse of middling sort by the learned in law. Charging a man with taking forbidden food or drinks, or taxing him with

(1) N. 15 & 16 Tit., 11—14 ; & Brih. XXI, 15.
(2) M. VIII, 269.
(3) N. 15 & 16 Tit., 2 & 3.

a mortal sin, or maliciously exposing his weakest points, is termed abuse of the highest degree". (4)

It may be mentioned here that though the truth of the allegation may mitigate the offence it does not completely exonerate an offender. Even taunt or abusive expression used by way of joke is punishable. This principle has been carried to such an extremity that it seems ludicrous to us that "one who calls an outcast outcast, or a thief a thief, is equally criminal with those whom he taxes (with their offence). (If he reproaches them) without reason, he is twice as guilty as they are". (5)

A. Insult or Taunt.

For taunting a man for his physical deformity (e.g., calling a lame man lame or a blind man as a man of beautiful eyes) the Hindu lawgivers prescribe a small fine ranging from 1 Karshapana to 13½ panas. (6)

The lawgivers are specially severe with the Sudras and other lowcastes for insulting a twiceborn man by mentioning his caste or name. The punishment prescribed is the thrusting of a long burning tong into the mouth of the offender or the cutting off of the tongue. (7)

For insulting or abusing father, mother, brother, teacher &c., Manu prescribes a fine of 100 panas, while Kautilya would insist on the cutting off of the tongue. (8)

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(4) Brih. XX, 2—4.

(5) N. 15 & 16 Tit., 21.

(6) M. VIII, 274 ; Vi. V, 27 ; Kau. III—Ch. XVIII—194 ; Y. II, 204 ; N. 15 & 16 Tit., 18 & 19 ; & M. P. CCXXVII, 80.

(7) M. VIII, 271 ; Vi. V, 25 ; N. 15 & 16 Tit., 23; & Brih. XX,12.

(8) M. VIII, 275 ; Kau. IV—Ch. XV—227.

B. Abuse.

Again, as regards abuse the law is brutally severe in the case of Sudras abusing a man of twice-born caste. The penalty prescribed is corporal punishment. (9) Only Brihaspati prescribes the cutting off of the tongue in the case of Sudras abusing a Brahmana but first and middling fines in that of a Vaisya and a Kshatriya respectively. (10)

In the case of other castes the lawgivers prescribe fines of various amounts according to the caste of the offender and the offended. The punishment is higher when a man of higher caste is abused, so also in the case of other people's wives. The fine is generally doubled if filthy language is used. (11)

Similar punishments should be inflicted in mutual recriminations. (12)

C. Defamation.

For defamation the lawgivers have generally laid down fines of 3 grades according to the caste of the aggrieved as well as of the nature of imputation. (13) It is interesting to note that for defaming a maiden with a view to breaking a marriage contract the suitor has been made liable to pay a fine of 100 panas if the allegations are not substantiated.(14)

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(9) G. XII, 1 ; Ap. II—10—27, 14 ; M. VIII, 267, 270 ; Vi. V, 23 & 24 ; N. 15 & 16 Tit., 15 & 22.

(10) Brih. XX, 11 & 12.

(11) G. XII, 8, 10—13 ; M. VIII, 267, 268 & 269 ; Vi. V.—31—39 ; Y. II, 205—207 ; N. 15 & 16 Tit., 16 & 17 ; Brih. XX, 7, 9—11 ; & M. P. CCXXVII, 68—73.

(12) M. VIII, 276 & 277 ; N. 15 & 16 Tit., 8 & 9 ; Brih. XX, 5 & 6.

(13) M. VIII, 273 ; Vi. V, 29—32 ; Kau. III—XVIII—193 & 194 ; Y. II, 210 & 211 ; Brih. XX, 1—4 ; & M. P. CCXXVII, 66.

(14) M. VIII, 225 ; Vi. V,47 ; N. 12 Tit., 34 ; & M. P. CCXXVII, 14.

Now we shall examine the laws of other countries. In Athens "what may be called ordinary abuse was not punishable. Solon forbade the levelling of abuse at the dead, or, as to the living, the indulging in it in certain specially protected localities—temples, tribunals and political assemblies. Certain particularly obnoxious terms of abuse were actionable. Magistrates were protected by the severe threat of *'atimia'*, against any abuse.....Fines in the cases ranged from the trifling sum of 5 drachmae to heavier penalties". (15)

According to the 'Twelve Tables' capital punishment was inflicted for libel or defamation. (16) But it would appear that in later times libel gave rise to private actions for damages.

In mediæval French law insults were treated as non-capital offences generally punishable with fines. 'Certain insults are of special gravity on account of the status of the persons addressed' and were punished with heavier fines. (17)

In England libels were punished with fines and corporal punishments. It was immaterial whether the allegation was false or true, though falsity might enhance the punishment. (18)

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(15) Historical Jurisprudence (Vinogradoff)—Vol. II—Ch. IX—Sec. 5—P. 194.

(16) T. T. 8^1 . (17) Cont. Cr. L. Part I—Ch. VI—39f.

(18) Black. IV—Ch. XI—Pp. 150 & 151.

CHAPTER XVI

OFFENCES RELATING TO GUILDS, CORPORATIONS AND COMPANIES.

That Corporate life was a prominent feature of ancient India is known to everyone who has read Dr. R. C. Majumdar's 'Corporate Life in Ancient India'. Almost all trades had guilds of their own, managed by their own officers. These guilds had their own rules and regulations. So also there were partnerships or companies formed to carry on business. Besides the trade guilds, there were corporations of religious, social or semi-political nature. The rules and regulations of these guilds and companies were binding on all members and were recognised by the state.

The state also did not shirk its duty to safeguard the interests of these corporations. It took care to see that these guilds and corporations did not suffer from internal quarrels and breach of its rules by members themselves. So Apastamba prescribes confinement for a man who violates the rules (of his caste or orders). If he do not amend even after this, he shall be banished. (1)

According to Manu if a member of a corporation (who as such has promised to abide by its rules and regulations) transgresses his promise by disobeying any such rule, out of greed, he shall be banished from the state. The man shall be further imprisoned and compelled to pay a fine of 4 Suvarnas, or 6 Nishkas, or one 'Satamana' of silver according to the circumstance of the case. (2) In such a

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(1) Ap. II, 10, 27, 18—19. (2) M. VIII, 219 & 220.

case Vishnu, however, recommends banishment only. (3)

According to Kautilya, if a person leave his guild after the work has been begun he shall be fined 12 panas. Even then he will not be allowed to leave the company. "Any person who has been found to have neglected his share of work by stealth (chauram) shall be shown mercy for the first time and given a proportional quantity of work anew with promise of proportional share of earnings as well. In case of negligence for a second time or of going elsewhere, he shall be thrown out of the company". (4)

Yagnavalkya recommends banishment and total forfeiture for a person who violates the established rules and regulations of a corporation (sangbidam langhayet) or who embezzles its property. So also, if any person disobeys the order of another who speaks in the interest of the guild, he shall be punished with the first amercement. If a person misappropriates anything which he earns in his capacity as a member of a guild or corporation, he shall be punished with a fine of eleven times its value. (5)

Narada does not specify any punishment but holds that for creating dissensions in an association or corporation a specially severe punishment shall be inflicted in the interest of that body. (6)

Brihaspati recommends banishment and total forfeiture for the violation of the agreements of a corporation or guild. For quarrelling with other members or neglecting one's proper share of work he prescribes a fine of 6 Nishkas or 4 Suvarnas. For creating dissension or anyway injuring the corporation banishment is recommended. (7)

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(3) Vi. V, 168.
(4) Kau. III—Ch. XIV—186.
(5) Y. II, 187—190.
(6) N. 10th. Tit., 6.
(7) Brih. XVII, 5, 13—16.

Katyayana prescribes a fine of 250 panas for a person who disobeys the advice given by one in the interest of a corporation. (8)

(8) Katyayana—Nonperformance of Agreement—V. Chen.

CHAPTER XVII

OFFENCES RELATING TO CATTLE TRESPASS.

Destruction of crop or such other things by cattle through the negligence of the owner or keeper of cattle was viewed as an offence punishable with fines. As a general rule when the injury was due to the negligence or fault of the keeper, he was punished; in his absence the owner was held responsible. Besides paying a fine to the king the keeper or the owner had to pay compensation to the sufferer. (1) The amount of fine depended on the nature of the injury done, the kind of cattle causing it, the nature of the place where the mischief was done and the length of time during which the injury was committed.

There were some exceptional circumstances, however, when the keeper or the owner of the cattle was not held responsible, e.g., if there was contributory negligence on the part of the owner of the field (if he did not properly fence the land) or if the field was situated near the road side or pasture ground and so on, or if the animal causing injury was specially exempted by law e.g., excellent bulls, animals let out in the name of the gods, cows within ten days of their giving birth to calf and so on. It would appear that according to some lawgivers if the animal destroyed crop, inspite of the best endeavours of its keeper to prevent it from so doing, or if the animal was unmanageable, there should not be any punishment. (2)

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(1) M. VIII, 241 ; Vi. V, 146 ; Y. II' 161 ; N. 11th Tit., 29.

(2) G. XII ; M. VIII, 238 & 242 ; Vi. V, 147 & 150 ; Kau. III—Ch. X—172 ; Y. II, 162 & 163 ; N. 11th Tit., 30, 32,33, & 46.

Thus Gautama is of the opinion that a keeper is responsible when any mischief is caused by the animal under his care in an enclosed field ; if there be no keeper the master of the animal is liable. (3) Manu holds the keeper only responsible and he completely absolves the owner of the cattle. According to him, if any damage be done by cattle, attended by its keeper, in an enclosed field near a highway or near a village, the keeper alone shall be fined 100 panas. But when there is no keeper it is the duty of the owner of the field to prevent the cattle from trespassing on his field. If the field be not surrounded with a fence even the keeper shall not be punished. If the cattle graze on any field situated otherwise, the keeper shall be fined $1\frac{1}{4}$ panas (per head). In all cases, however, compensation shall be paid to the owner of the field. (4) Vishnu holds opinions similar to that of Gautama. (5) According to Yagnavalkya the keeper should be chastised, but the fine shall be paid by the owner of the cattle. (6) Narada is of the same opinion. Most probably they contemplate the cases where the keeper allows the cattle under his care to destroy other peoples' property according to the instruction or with the connivance of the owner. This conclusion becomes irresistible when we consider another recommendation of Narada where in he lays down, "When cows, straying through the fault of their keeper, have entered a field, no punishment shall be inflicted on the owner of the cows : the herdsman (alone) is punishable (for the damage done by them)". And "a fine shall be imposed on the herdsman when grain has been trodden down (by cows)". (7)

When the damage is done by a buffalo the fine is 10 mashas according to Gautama, 8 mashas according to Vishnu & Yagnavalkya, $\frac{1}{4}$ pana according to Kautilya, 2

(3) G. XII, 19—21. (4) M. VIII, 238—241. (5) Vi. V, 140, 141.
(6) Y. II, 161. (7) N. II Tit., 28, 29, 35, & 39.

mashas according to Narada, 8 panas according to Katyayana. (8)

When by a horse the fine is 10 mashas according to Gautama, 8 mashas according to Vishnu, $\frac{1}{8}$th pana according to Kautilya & no punishment according to Narada. (9)

When by a camel the fine is 6 mashas according to Gautama, 8 mashas according to Vishnu, and $\frac{1}{4}$ pana according to Kautilya. (10)

When by an ass the fine is 6 mashas according to Gautama, 8 mashas according to Vishnu, and $\frac{1}{8}$th pana according to Kautilya. (11)

When by a cow the fine is 5 mashas according to Gautama, 4 mashas according to Vishnu, $\frac{1}{8}$th pana according to Kautilya, 4 mashas according to Yagnavalkya, 1 masha according to Narada, and 4 panas according to Katyayana. (12)

When by a goat or sheep the fine is 2 mashas according to Gautama, Vishnu and Yagnavalkya, $\frac{1}{16}$th pana

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(8) G. XII, 24 ; Vi. V, 140 ; Y. II, 159 ; Kau. III Ch. X—172 ; N. 11th Tit., 31 ; Katyayana—Of Preservation of grain—V. Chin.

(9) G. XII, 24 ; Vi. V, 142 ; Kau. III—Ch. X—172 ; N. 11th Tit., 30 & 32.

(10) G. XII, 23 ; Vi. V, 142 ; Kau. III—Ch. X—172.

(11) G. XII, 23 ; Vi. V, 142 ; Kau. III—Ch, X—172.

(12) G. XII, 22 ; Vi. V, 143 ; Kau. III—Ch. X—172 ; Y. II, 159 ; N. 11th Tit., 31 ; & Katyayana—Of Preservation of grain—V. Chin.

according to Kautilya, ½ masha according to Narada, and 4 panas according to Katyayana. (13)

If the cattle sit in the field after the destruction of crop the fine shall be double the stated amounts. (14)

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(13) G. XII, 25; Vi. V, 144; Y. II, 159; Kau. III—Ch. X—172; N. 11th Tit., 31; Katyayana—Of Preservation of grain—V. Chin.

(14) Vi. V, 145; Y. II, 160; Kau. III—Ch. X—172; N. 11th Tit., 34.

CHAPTER XVIII.

MISCELLANEOUS OFFENCES.

1. GAMBLING AND BETTING ON FIGHTING ANIMALS.

From a study of the Sanskrit literature it would appear that gambling with dice was very popular in ancient India. It was the most favourite pastime of kings and nobles as well as of common folk. But its evil effect was quite out of proportion to the pleasure it gave. It brought ruin to many a palace and humble cottage. The most notorious instance is that of Mahabharata. Not only is gambling ruinous to the peace, prosperity and happiness of gamblers and their families but is also detrimental to their moral life. It gives birth to many vices and turns many a saint into a worst criminal.

There had been, from the earliest times, a strong sentiment against gambling. Manu prohibits it in unequivocal terms. He is not prepared to show the least indulgence to gamblers. The punishment urged by him is either corporal punishment or exile. Thus he goes on :—

"Gambling and betting let the king exclude from his realm ; those two vices cause the destruction of the kingdom of princes.

"Gambling and betting amount to open theft ; the king shall always exert himself in suppressing both (of them).

"When inanimate (things) are used (for staking money on them), that is called among men gambling, when inanimate beings are used (for the same purpose), one must know that to be betting.

"Let the king corporally punish all those (persons) who either gamble and bet or afford (an opportunity for it), likewise Sudras who assume the distinctive marks of twice-born (men).

"Gamblers, dancers and singers, cruel men, men belonging to a heretical sect, those following forbidden occupations, and sellers of spirituous liquor, let him instantly banish from his town.

"In former kalpa this (vice of) gambling has been seen to cause great enmity ; a wise man, therefore, should not practise it even for amusement.

"On every man who addicts himself to that (vice), either secretly or openly, the king may inflict punishment according to his discretion". (1)

It was, however, impossible to check gambling by penal laws. Men would face the worst consequences to satisfy their gambling spirit. Kings and princes also would pay scant regard to these salutary laws. Not only would this afford them great pleasure but would bring much revenue to the royal treasury, for masters of the gaming houses had to pay a certain percentage of the stakes to the king. And where rulers and administrators themselves were guilty of this offence, these laws would naturally become a dead letter. Consequently it was found necessary to legalise gambling under proper restrictions. Other considerations also prompted the later

(1) M. IX, 221—228.

lawgivers to permit gambling. Gambling dens were generally frequented by thieves, robbers and other criminals, who went there to spend their ill-gotten wealth. Plans to commit crimes were often hatched in these places. And under the influence of liquor criminals would often divulge their secrets. So, royal officers and spies stationed here would often get the clues to many a mysterious crime which had baffled their skill and ingenuity. Hence Kautilya (Gudagibignapanartham) and Yagnavalkya (taskaragnanakaranat) put forward these reasons to legalise and centralise gambling. (2)

In later times the legislators were not inclined to give their wholehearted support to gambling. So Brihaspati says, "Gambling has been prohibited by Manu, because it destroys truth, honesty and wealth. It has been permitted by other (legislators) when conducted so as to allow the king a share (of every stake). It shall take place under the superintendence of keepers of gaming houses, as it serves the purpose of discovering thieves. The same rule has to be observed in bets on prize fights with animals". (3) Though Brihaspati gives his qualified support, Katyayana again is dead against it. In his opinion, 'persons should never engage in gambling with dice : it inflames avarice and anger, is the source of evil, is cruel, destroys human wealth, and gives birth to quarrels, as poison comes out of the mouths of serpents. The king shall therefore check it in his kingdom'. That is also the view of Matsya Purana. (4)

Nevertheless gambling was permitted under proper supervision of royal officers. It was, moreover, centra-

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(2) Kau. III—Ch. XX—198 ; & Y. II, 203.

(3) Brih. XXVI, 1 & 2. (4) Katyayana—Gambling with dice and living creatures—V. Chin ; M. P. CCXXVII, 149—156.

lised. (5) The keepers of gaming houses appear to be semi-royal officers. (6) They had to take a license from the king, and if any one played without permission from the king he was punished with fines. (7) Dice was supplied by the superintendent of gambling and if it was substituted by the sleight of hand, the offender was punished with a fine of 12 panas. (8)

It may be noted here that whenever any dispute arose on any point in the game, the gamblers themselves were to be judges and witnesses. (9)

For playing with false dice Vishnu prescribes mutilation of hand. To this punishment Kautilya adds an alternative, viz., a fine of 400 panas. Yagnavalkya recommends branding and banishment. Narada is in favour of expulsion from the gaming house after being garlanded with a wreath of dice. Brihaspati, however, does not specify any punishment but regards them as impostors. (10)

For playing fraudulently in a game of dice mutilation of thumb and forefinger has been urged by Vishnu. According to Kautilya the punishment shall be first amercement, or a fine for theft and cheating. Brihaspati recommends banishment for false gamblers. (11)

These rules applied also to betting on animals.

In mediæval France the government tried to repress gambling by various ordinances. According to Bouteiller

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(5) Kau. III—Ch. XX—198 ; Y. II, 203. (6) Brih. XXVI, 2.
(7) N. 17th Tit., 7. (8) Kau. III—Ch. XX—198.
(9) Y. II, 202 ; N. 17th Tit., 4 ; Brih. XXVI, 6.
(10) Vi. V, 134 ; Kau. IV—Ch. X—225 ; Y. II, 202 ; N. 17th Tit., 6 ; Brih. XXVI, 9.
(11) Vi. V, 135 ; Kau. III—Ch. XX—198 ; & Brih. XXVI, 5.

the keepers of gambling houses were to be fined 60 sous. (12)

In England earlier statutes prohibited all except gentlemen to play tennis, cards, dice &c. By 9 Ann. c. 14, cheating in games was made punishable with corporal punishments and infamy. By many statutes of the reign of George II private lotteries and gambling were prohibited under pains of pecuniary penalties. Racing also was regulated by 13 Geo. II. c. 19. (13)

2. OFFENCES RELATING TO TREASURE-TROVE.

In ancient India if any man found treasure-trove he was bound to inform the king of it. In the case of non-Brahmanas the king took a share of it, and according to Vishnu a share was given to the Brahmanas. The finder took the residue. If a Brahmana found such hidden treasure he got the whole of it ; nevertheless he must report the matter to the king. Otherwise he was regarded as a thief and was punished. For appropriating treasure-trove, without informing the king, Vishnu has laid down the confiscation of the entire property of the offender. Kautilya recommends a fine of 1000 panas. Yagnavalkya does not specify any punishment but simply says that the offender shall be punished (according to strength—Mitakshara) and the treasure-trove shall be confiscated. (14) According to Narada even a Brahmana must give notice to the king, otherwise he shall be viewed as a thief. (15)

As regards treasure-trove if any person falsely says that he has hidden it he shall be punished with a fine. (16)

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(12) Cont. Cr. L.—Part I—Ch. VI—39f.
(13) Black. IV—Ch. XIII—Pp. 170—172.
(14) Vi. III, 62 ; Kau. IV—Ch. I—202 ; Y. II, 35.
(15) N. 7th Tit., 6. (16) M. VIII, 36 ; & Vi. III, 64.

In England if a person concealed a treasure-trove (which was to go to the king) he was punished with fine and imprisonment in the time of Blackstone. In former times the punishment was death. (17)

3. USURY.

Usury was not permitted in ancient India. Although canonical lawgivers do not lay down any specific punishment for this offence, yet it is clear that this was punished. For all of them have fixed the lawful rate of interest, though they are inclined to make some relaxation in time of distress. (18)

Kautilya lays down specific punishments for taking excessive (beyond the customary rate) interest. The punishment according to him is the lowest amercement. (19)

Usury was also forbidden by the Hebrew and Roman laws. In mediæval France many ordinances were issued against usury. The punishment prescribed was confiscation of personal property, fine and banishment. In England also the rate of interest was fixed by many statutes, and usury was regarded as a misdemeanour. (20)

4. CRUELTY TO ANIMALS.

It was regarded as an offence to give unnecessary

(17) Black. IV—P. 120.

(18) G. XII, 29ff.; Vas. II, 48; Bau. I—5—10, 22 & 23; M. VIII, 140—142 & 151—153; Vi. VI, 2—4, 10—17; Y. II, 37—39; N. 1st Tit., 98ff.; & Brih. XI, 2ff.

(19) Kau. III—Ch. XI—174.

(20) T. T. 8^{18}; Cont. Cr. L.—Part I—Ch. VI—39f; & Black. IV—Ch. XII—P. 156.

pains to animals or to treat them cruelly. This is, indeed, a notable feature of the Hindu law.

Manu prescribes suitable punishments (proportionate to the amount of pain inflicted) for causing pain to animals. The punishment is to be imposed whether pain has been inflicted by the owner or a third person. (21)

According to Kautilya, if a stray cattle trespass into another man's land, he may drive it away by using ropes or sticks, but he shall be punished in case the animal is hurt in anyother way (i.e. if the animal is severely hurt). (22)

According to Brihaspati, "He who employs at an improper time, for drawing or carrying, tired, or hungry, or thirsty animals, shall be compelled to atone for it in the same way as a cow-killer, or to pay the first fine". (23)

A fine of 100 panas has been prescribed by Vishnu and Yagnavalkya for castrating animals. Kautilya lays down the lowest amercement. (24)

In this connection it may be mentioned that though animal sacrifice is a part of the Hindu religion yet the Hindu law does not permit unnecessary killing of any animal. Vishnu has laid down punishment for unnecessarily killing even a worm !

5. OFFENCES RELATING TO GAMES.

The canonical lawgivers have prescribed punishments for maiming or destroying animals and in some cases for killing some auspicious animals and birds. In doing this

(21) M. VIII, 286. (22) Kau. III—Ch. IX—173.
(23) Brih. XXI, 16.
(24) Vi. V, 119 ; Y. II, 236 ; & Kau. III—Ch. XX—199.

they have been actuated by a religious and moral motive, or by a regard for proprietory right. They do not seem to care for the preservation of games. Even Vishnu who prescribes a fine of 50 karshapanas for killing wild animals and a fine of 10 karshapanas for killing birds and fishes, has done this for moral reasons only. (25)

Kautilya, the chief minister of a powerful monarch, takes special care for the preservation of games. He prescribes capital punishment for killing elephants in reserve forests, while for entrapping, killing or injuring 'deer, bison, birds and fish which are declared to be under state protection' the highest fine is recommended. He gives us a long list of animals that should be protected by the state. It may be that he has been partly actuated by religious motives also. (26)

In case the beasts that are preserved in the reserve forests trespass and graze in the field of any man, he is to report the matter to a forest officer and he may drive them away, but on no account he should hurt or kill them. (27)

Even for trespassing in a reserve forest Kautilya lays down middlemost amercement. (28)

As the severity of the game laws of mediæval European countries is notorious it is needless to go into details.

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(25) Vi. V, 52—54. (26) Kau. II—Ch. XXVI—122.
(27) Kau. III—Ch. X—173. (28) Kau. II—Ch. XXVI—122.

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ABBREVIATIONS.

G.	Gautama.
M.	Manu Samhita.
Y.	Yagnavalkya.
Ap.	Apastamba
Bau.	Baudhayana.
Vas.	Vasistha.
Vi.	Vishnu.
N.	Narada.
N. N. M.	Narada, Nepalese, Manuscript.
Brih.	Brihaspati.
V. Chin	Vivada Chintamoni.
Vy. May	Vyavahara Mayukha.
Rat.	Vivada Ratnakara.
Kau.	Kautilya's Athasastra.
Mr.	Mricchakatika.
Ag. P.	Agni Purana.
M. P.	Matsya Purana.
Sukra.	Sukranitisara.
Black.	Blackstones' Commentaries.
Just.	Justinian's Institute.
T. T.	Twelve Tables.
Ham.	Hammurabi.
Zend. Vend.	Zenda-Avesta, Vendidad.
Demos.	Orations of Demosthenes.
Cont. Cr. L.	A History of Continental Criminal Laws.
Deu.	Deutronomy.
Ezek.	Ezekiel.
Exod.	Exodus.
Lev.	Leviticus.

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